TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 177

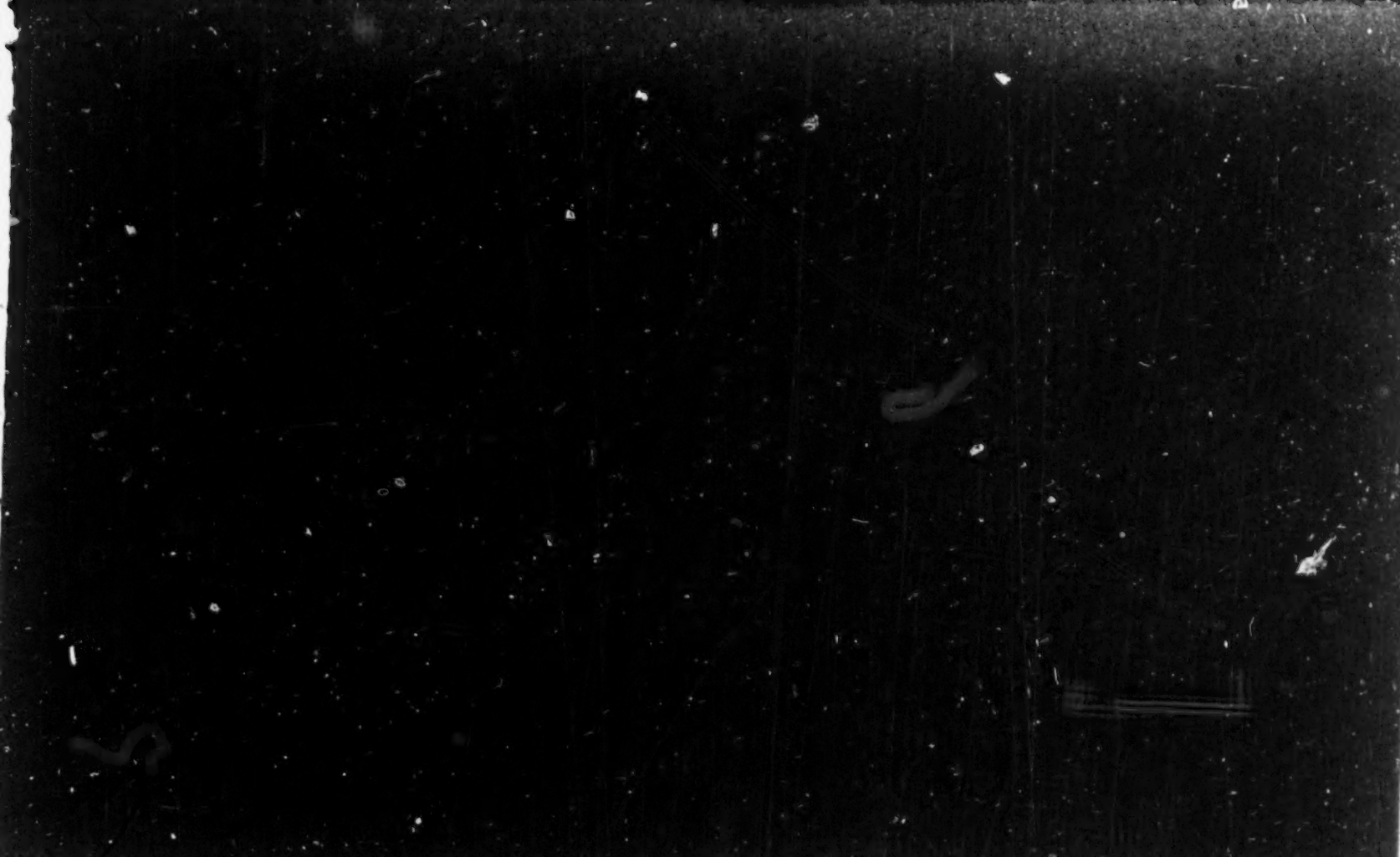
J. S. KOHN, M. S. KOHN AND J. W. KOHN, ADMINISTRATORS OF THE ESTATE OF CARRIE KOHN, DECEASED, APPELLANTS,

vs.

CENTRAL DISTRIBUTING CO., INC., AND THE COMMONWEALTH OF KENTUCKY, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

FILED JULY 5, 1938.



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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 9, 1939.

[fol. 1]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

Exhibit "A"

Carroll's Kentucky Codes

Sec. 63. Fine or forfeiture to recover; officer against.—Actions must be brought in the county where the cause of action, or some part thereof, arose—

1. Fine, penalty, or forfeiture to recover.—For the recovery of a fine, penalty, or forfeiture, imposed by a statute; but if the offense for which the claim is made be committed on a water-course or road which is the boundary of two counties, the action may be brought in either of them.

2. Public officer; against.—Against a public officer for an act done by him in virtue or under color of his office, or for a neglect of duty.

3. Action on official bond.—Upon the official bond of a public officer.

[fol. 2] Exhibit "B"

Carroll's Kentucky Statutes

Sec. 976. Franklin Circuit Court; jurisdiction in Commonwealth cases.—The Franklin circuit shall have jurisdiction, in behalf of the Commonwealth, of all causes, suits and motions against clerks of courts, collectors of public money, and all public debtors or defaulters, and others claiming under them; and for this purpose its jurisdiction shall be co-extensive with the state.

[fol. 3] Exhibit "C"

Constitution of Kentucky

Sec. 172. Assessment; how value fixed; penalty.—All property, not exempted from taxation by this Constitution,

shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any wilful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished, as may be provided by law.

[fols. 4-5] EXHIBIT "D"

CONSTITUTION OF KENTUCKY

Sec. 171. Levy and collection of taxes by general laws; public purposes only; uniform within the class and territory; classification of property; bonds of state and its divisions exempt; referendum of laws classifying property; provisions for.—The general assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

[fols. 6-10] EXHIBIT "E"

CONSTITUTION OF KENTUCKY

Sec. 174. Corporate, to be taxed like individual property; incomes; licenses; franchises.—All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses or franchises.

[fol. 11] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Equity No. —

J. W. KOHN, M. S. KOHN, and J. W. KOHN, Administrator of the Estate of Carrie Kohn, Deceased, Petitioners,

vs.

CENTRAL DISTRIBUTING COMPANY, INC., 45 E. 11th Street, Newport, Kentucky, and the Commonwealth of Kentucky, by and on Relation of James W. Martin, Commissioner of Revenue, and Louis C. Sickmeier, Sheriff, Campbell County, Ky., Respondents

AMENDED PETITION FOR INJUNCTION—Filed April 11, 1938

Now comes the petitioners above named, and for a cause of action against the respondents, allege and complain:

1. The petitioners above named state that they are citizens and residents of the State of Ohio, residing in the City of Cleveland; that since the execution of the mortgage hereinafter referred to, Carrie Kohn, one of the petitioners, has deceased, and J. W. Kohn is the duly qualified and acting administrator of her estate.

2. That the respondent, the Central Distributing Company, Incorporated, licensee, is a corporation organized under the laws of the State of Kentucky, and the said James W. Martin, Revenue Commissioner of the said state, is a citizen and resident of the State of Kentucky, and resides in the City of Frankfort; that said respondents are non-resi-
[fol. 12] dents and non-citizens of the State of Ohio, and your petitioners are non-residents and non-citizens of the State of Kentucky.

3. That on or about the 9th day of February, 1937, the respondent corporation, the Central Distributing Company, Incorporated, by its president, William Ploss, and R. Webster, Secretary, did execute its note to the petitioners above named, in the sum of Three Thousand ($3000.00) Dollars, payable on demand and from and after date, with interest

at the rate of 6% per annum, which said note was payable at 45 E. 11th Street, Newport, Kentucky. That said note was secured by a chattel mortgage executed on the 9th day of February, 1937, which said mortgage was filed of record in the County of Campbell, State of Kentucky, on the 27th day of March, 1937, at three o'clock and three minutes P. M., on that date; that said mortgage is duly recorded in the Clerk's office of said County of Campbell, in Book No. 18, Page 491, file No. 977, and that at all times hereinafter alleged was an existing and valid lien against the property specified in said mortgage owned by the Central Distributing Company, Inc., one of the respondents herein. That no part of said sum has been paid and that the same is now due and the said respondent is in default of the payment thereof and due demand was made for the payment of said on or about the — day of May, 1937. That the petitioners took possession of said property on or about said date and have carried on said business under the authority of the Central Distributing Company, Inc., since said time. A copy of said note and mortgage is attached hereto and made a part hereof, of this, the petitioners' said complaint. The amount in controversy in this action is the sum of Four Thousand, Four Hundred and Sixty-eight and 65/100 ($4,468.65) Dollars, claimed by the said James W. Martin, and the amount due petitioners is more than the sum of Three Thousand, One Hundred ($3,100.00) Dollars,

4. That on or about the 16th day of February, 1938, the respondent, James W. Martin, as Commissioner of Revenue for the Commonwealth of Kentucky, attached all of the property covered by the said chattel mortgage of your petitioners, and now, by the Sheriff of Campbell County, Kentucky, L. C. Sickmeier, holds possession of all the said personal property, and has ousted your petitioners of the control of said property, and has taken possession of the business of the said Central Distributing Company, Inc., licensee, which act of the said respondents, James W. Mar-
[fol. 13] tin, Revenue Commissioner, and the said Sheriff, renders the security of your petitioners' impossibility of conversion into cash to satisfy the said note hereinbefore referred to; that at the time your petitioners took possession of said property, they appointed Harry Bayer as their agent, to carry out the terms of the agreement made between your petitioners and the Central Distributing Company, In-

corporated, licensee; that your petitioners would dispose of all of said assets covered by said mortgage, and continue the operation of said business until the said note was fully satisfied and paid; that the said Harry Bayer was in possession, as the agent of your petitioners, at the time of the service of the attachment above complained of and seizure of the property.

5. That your petitioners are informed and fully believe that the Central Distributing Company, Inc., licensee, is not indebted to the State of Kentucky in the sum complained of in the Petition of the Commonwealth of Kentucky, and James W. Martin, Revenue Commissioner, or the Commonwealth of Kentucky in any sum whatsoever.

6. That said property seized by the said James W. Martin, Revenue Commissioner, for the Commonwealth of Kentucky, is a part of the assets covered by the mortgage of your petitioners.

7. That all of said property, except the equipment in the office of the said Central Distributing Company, Incorporated, is whiskey in transit, imported from the State of Ohio, and on its way to the State of Florida; that at the time of the levy of the attachment complained of, the whiskey attached was in interstate commerce and in the original package, and was not located in the City of Newport, County of Campbell, State of Kentucky, for the purpose of local sale, but *the* the purpose of transporting the same to its final destination in the State of Florida. That at the said time and place, when said attachment order was served on the Central Distributing Company, Incorporated, licensee, the sum of Fifty-five ($55.00) Dollars in cash, the property of your petitioners, was seized by the Commonwealth of Kentucky and James W. Martin, Revenue Commissioner, through the Sheriff of the County of Campbell, State of Kentucky, Louis C. Sickmeier.

8. That said property, at said time, was not subject to [fol. 14] garnishment or attachment by the said James W. Martin, Revenue Commissioner, and was not the property of the Central Distributing Company, Incorporated, licensee, except in the respects hereinbefore alleged; that the said Central Distributing Company, Incorporated, licensee, had no title or interest in said property except subject to

the lien provided by law and set out in the chattel mortgage of your petitioners.

9. That the taxes claimed as in default and due the Commonwealth of Kentucky are not a just claim against the Central Distributing Company, Inc., licensee. That the said statute under which the said taxes are claimed to be due is a void statute under the laws of the State of Kentucky, and were assessed against the Central Distributing Company, Incorporated, licensee, in violation of the Constitution of the State of Kentucky, Article on Revenue and Taxation, Sections 171, 172, 174 and 181. That said act under which taxes are attempted to be collected is referred to as "An Act relating to revenue and taxation on the sale and disposition of alcoholic beverages, etc.", approved by the Governor of the State of Kentucky, April 9, 1936. That said act lacks uniformity in its operation, and is an arbitrary classification of alcoholic liquors for taxation in violation of the Constitution of the State of Kentucky, Sections 171, 172, 174 and 181, as alleged, discriminatory and confiscatory. And in its operation is in violation of the Constitutional prohibition against local legislation, Section 59 of the Constitution. That the said tax attempted to be collected by the Commonwealth of Kentucky and James W. Martin, Revenue Commissioner, against the said Central Distributing Company, Inc., licensee, is not a valid license tax or a valid sales tax, or a valid franchise tax, or a valid ad valorem tax or a privilege tax, or a special tax, or excise tax, as provided by the Constitution of the State of Kentucky; that said tax is discriminatory against the respondent, Central Distributing Company, Incorporated, licensee, in that it provides for the levy of a tax not bases on the value of the whiskey sold, and the property sought to be taxed by the respondents, Commonwealth of Kentucky and J. W. Martin, Revenue Commissioner, and is not proportioned on the value of the whiskey sold, and is in derrogation of the Constitution of the State of Kentucky, and of the rights of said Central Distributing Company, Inc., licensee, as provided in the Constitution as afore-alleged. That said act violates Article I, [fol. 15] Sec. 8 of the Constitution of the United States, and said act violates Section 9 of Article I of the Constitution of the United States, and said act violates Article I, Sec. 10 of the Constitution of the United States, and the Interstate Commerce Laws, enacted by the Congress of the

United States, and the 14th Amendment to the Constitution of the United States.

That said revenue act of the State of Kentucky, hereinbefore referred to is a burden on the commerce between states—Article I, Sec. 8 of the Constitution of the United States—and is in violation of the Constitution of the United States, controlling the import and export of commerce, and is in violation of the uniformity clause of the Constitution of the United States, and of the State of Kentucky relating to taxes.

10. (a) That in the attempt of the State of Kentucky and the respondents to enforce the present liquor control act, enacted March 3, 1938, is an ex post facto act as to the administration of the act of 1934, and in respect to Sec. 4 of the 1936 Act, the said action violates the 8th section of Article I of the Constitution of the United States, in that it is not uniform, because it taxes whiskey of the value of forty-five cents per gallon, and whiskey of the value of eighteen dollars per gallon, at the rate of $1.04 per gallon, and other whiskies of different values at the same amount of tax.

(b) That Sec. 4 of said Act of 1936 violates Sections 171, 172, 174 and 181 of the Constitution of Kentucky, because it is repugnant to the — confiscatory, because the tax is greater than the value of the new whiskey and the one-year old whiskey and the two-year old whiskey; that the Act of 1938, March 3, as administered by respondents, is a violation of Sec. 10, Article I, of the Constitution of the State of Kentucky, Sec. 19 prohibiting ex post facto legislative acts, and the administration thereof; and that the respondents are now attempting to, and have ordered a hearing for the purpose of revoking the license of the Central Distributing Company, Incorporated, licensee herein, without adjudication by a judicially constituted court of the State of Kentucky, when the said respondents have no legislative authority to hold said hearing, based on the failure of said licensee to pay taxes under the act of 1936 as aforesaid; except under the act of March 3, 1938, which was enacted subsequent to the alleged due tax, under the Act of 1936, and against the licensee, a legal entity licensed under the [fol. 16] 1934 act now repealed, and which was, at all times hereinbefore alleged, violative of Amendment 7 to the Con-

stitution of the State of Kentucky, prohibiting the sale of whiskey in Kentucky as a beverage.

(c) That all of the acts of the respondents in the enforcement of said Act of 1936 (Sec. 4), and the enforcement of the Act of March 3, 1938, deny to the licensee due process of the laws of the State of Kentucky, Article 5 of the Constitution of the United States, and Amendment 14 to the Constitution of the United States, by denying the equal protection of the laws of the State of Kentucky, and the due process of the laws of the State of Kentucky, *and the due process of the laws of the State of Kentucky,* which, petitioners allege, are federal, constitutional guarantees to said licensee, that taxes shall be enforced according to the Constitution of Kentucky, and that no ex post facto legislation shall be imposed on said licensee, in respect of hearings or in respect of the enforcement of the laws that have been repealed, or in respect to the administration of the laws of the State of Kentucky, according to the said Constitution, in that its rights shall be determined at a hearing before a court of justice with jurisdictional and judicial powers; and that the Franklin Circuit Court of the State of Kentucky is without judicial grant of power to hold a hearing, or issue processes for the enforcement of said alleged taxes, or attach petitioners' merchandise, which it is attempting to do by an action now pending, brought by the respondents in the Franklin Circuit Court, and wherein it would attach licensee's property, and close its said business, in violation of Federal and State laws, and against the vested interests of the petitioners under their said mortgage.

That said proceeding denies the licensee of adjudicating its rights in a court with constitutional powers; and denies to it the due process and the equal protection of the laws of the United States; and said acts violate Section 8, Article I, of the Constitution of the United States, as guaranteed under Amendment 14 of the Constitution of the United States in the regulation of commerce between states, and is a direct burden on interstate commerce, in that the whiskey seized by the respondents was whiskey in transit from the State of Kentucky to another state, and violates the federal permit and license granted licensee by the United States, to engage in interstate commerce in liquor, [fol. 17] as provided by the revenue laws of the United

States. All of which destroys petitioners' security for its said debt due to them.

(d) That the construction of these laws is necessary for the determination of licensee's rights to do business and carry on its said business, and for the protection of the mortgage rights of these mortgagees. That the respondents are attempting to enforce the repeal laws of the Act of 1934, and said Section 4 and Section 22, which provide a fine and imprisonment of officers of licensee in a court, the Franklin Circuit Court, without jurisdiction to act in the respects herein alleged. That respondents are attempting, to collect an invalid tax in the sum of Forty-four Hundred ($4400.00) Dollars from petitioners. That respondents are attempting, by an ex post facto law to enforce the collection of taxes that are invalid; that they are burdening interstate commerce as aforesaid. That by their said acts of attempted enforcement of this tax, which is void and invalid, they are aided by the agents of the United States Government, which agents are prohibited by the 5th Article of the Constitution of the United States, in that said agents of the United States Government have and are visiting the place of business of said licensee, and demanding the examination of its books, pending a proceeding in the City of Washington, D. C., on a hearing for the suspension of licensee's right to carry on business as aforesaid under its said permit, without an order from the court holding said hearing, and without the authority of any valid law or regulation of the United States Government, or of any court with jurisdiction of licensee's business.

(e) That licensee has not been adjudicated in any court to have been engaged in, or of unlawfully operating its said business or of having refused to obey any valid law of the State of Kentucky, or of the United States, under its said permit, and has sold largely all liquors in interstate commerce without any tax due, or to be lawfully exacted of it by the said respondents; all of which acts of respondents deny the due process of the laws of the State of Kentucky, as guaranteed by the 14th Amendment to the Constitution of the United States, to licensee, and the equal protection of the laws thereof, which unlawful acts of respondents affect and destroy the security of these petitioners.

[fol. 18] (f) That the Act of March 3, 1938, of the Legislature of Kentucky, violates the Constitution of the State of Kentucky, in that it invades, by its terms, the laws controlling the commerce between the states, provides for no constitutional machinery of enforcement, and taken as a whole, it is repugnant to the constitutional provisions thereof Sections 3 and 19; it is unenforceable, unintelligible and incapable of legal enforcement, and creates and establishes a monopoly under the control of respondents, in transportation, in selling intrastate and interstate liquors, and confers and delegates legislative power to respondents and judicial power to respondents, in violation of the Bill of Rights of the Constitution of the State of Kentucky and the provisions thereof, relating to legislative, judicial and executive departments of government.—Sections 26, 27, 28 and 109.

(g) That is, under the terms of this Act, enforcement of which is now sought by respondents against the said licensee, constitutes oppression of said licensee and its rights, under its State and Federal permits; that the said acts of respondents as aforesaid, deny to these petitioners and to their said licensee, an adequate or a speedy remedy at law by appeal; that the damage inflicted by respondents in seizing licensee's business, and the procedure to revoke its permit, and impair its contracts for future delivery of whiskey, constitute irreparable damage and wrong and injury to its said business; that by reason thereof, these petitioners will lose their money, their mortgage contract will be impaired, and their security dissipated and lost by the payment of attorneys' fees, court costs and damage suits for breach of contracts; that petitioners or their licensee will be unable to perform, by reason of the unlawful acts of respondents, and which contracts are incurred in interstate commerce.

(h) That respondents have already seized merchandise in the sum of approximately Four Thousand ($4,000.00) Dollars, which was moving in interstate commerce, and though respondents collected at different times from licensee large sums of money on imported whiskey brought into Kentucky from other states, and imported in interstate commerce, nevertheless petitioners' licensee would not resist said respondents because of the fact that they would

revoke and cancel licensee's permit to do business in the State of Kentucky, if it objected to the payment of said [fol. 19] taxes; that said tax was not levied for the purpose of inspecting the importation of said merchandise, and no part of the same was paid into the Treasury of the United States.

11. That Louis C. Sickmeier is Sheriff of Campbell County, Kentucky, and as such officer, seized said property and is in possession thereof.

12. That your petitioners will suffer irreparable injury and damage and they have no adequate remedy at law to protect their property and their rights to and in said property, and unless an injunction is issued by this court, will continue to suffer irreparable injury and damage to the property and the said business, and leave no security for their debt.

13. That Chapter 16, Carroll's Code of Kentucky, exempts any officer levying process on any property of an individual or corporation from damages for wrongful act, and the said act and the statutes exempt the State of Kentucky for similar offense, and further provides that the Commonwealth of Kentucky may not be sued in damages. The petitioners, therefore, have no adequate remedy for wrongful act of the respondents. That by reason of said statutes and exemption of liability of the respondents, the petitioners are denied due process of the laws of the State of Kentucky, in violation of Amendment 14 of the Constitution of the United States, and the equal protection of said laws.

14. That in all cases where attachment suits are brought and levies made, the Statutes require that individuals or corporations give a bond to secure the wrongful acts of the said petitioners, and the petitioners allege that they are in this case denied the equal protection of the laws of the State of Kentucky, by reason of said discriminations and the equal protection of the laws as prohibited to the Legislature of Kentucky by the 14th Amendment to the Constitution of the United States.

15. That all or nearly all of commerce in which these petitioners are engaged is in interstate commerce, and that all of the transactions in which petitioners are engaged

are controlled by the Twenty-first Amendment to the Constitution and the Act of Commerce which is a law of the Congress controlling the business of these petitioners, and the Central Distributing Company, Incorporated's licensee.

[fol. 20] 16. That at the time of the levy complained of, the respondents, the said Sheriff of Campbell County, Kentucky, and the said James W. Martin, Revenue, Commissioner, under attachment process, closed the place of business of the petitioners without legal or statutory authority of the State of Kentucky in this proceeding. That said business could not be seized and closed except by a revocation of the license of the Central Distributing Company, Incorporated, under and by authority of an entirely different procedure and statute, and such action has not been taken by the State of Kentucky.

17. That the Act of the Legislature of Kentucky, of 1934, prohibits the sale of or manufacture of or transportation of spirituous, vinous or intoxicating malt liquors, except for medicinal purposes, and that the tax herein sought to be collected is a tax levied under a subsequent act of the Legislature of Kentucky in 1936, which tax was levied against wholesalers and retailers licensed to sell medicinal liquor under the act of 1934.

18. That said act of 1934 was, in truth and in fact, a law enacted, licensing wholesalers to sell, transport and deliver alcoholic liquors and intoxicating liquors as a beverage, and was so treated at all times hereinbefore alleged, and is now recognized by the respondent commissioner and the State of Kentucky as a licensing act and a tax act for the sale of alcoholic liquors purely as a beverage.

19. That at the time of its enactment in 1934, there was no grant of authority to the legislature of Kentucky to enact any valid law for the sale of intoxicating liquors in the State of Kentucky, or to license wholesalers for the said purpose. This because the Constitution of Kentucky prohibited the sale of whiskey and the licensing of wholesalers for the sale of whiskey as a beverage, which said provision of the Constitution is Section 226a, as follows:

"Manufacture, sale or transportation of intoxicating liquors prohibited: Exception: Legislature to enforce.—After June 30, 1920, the manufacture, sale or transportation

of spirituous, vinous, malt or other intoxicating liquors, except for sacramental, medicinal, scientific or mechanical purposes, in the Commonwealth of Kentucky, is hereby prohibited. All sections or parts thereof of the constitution, [fol. 21] insofar as they may be inconsistent with this section, are hereby repealed and nullified. The general assembly shall enforce this section by appropriate legislation."

20. That said act was and is in violation of the provision hereinbefore alleged; that said act of 1936 can only be regarded and is an act amendatory and supplemental to the act of 1934; that the act of 1936 contains no authorized provision for the licensing of wholesalers or retailers or the sale and transportation of intoxicating liquors; that the act of 1936 standing alone, exclusive of the act of 1934, does not create a licensee for the wholesale of intoxicating liquors, and, therefore, the act of 1936 was invalid and ineffectual as a taxing act, because there was, at the time of its enactment, no valid power of the State of Kentucky that could be exercised for the license of wholesalers dealing in intoxicating liquors as a beverage.

21. That it is alleged by the petitioners that at said time the attachment and levy was made upon the property of the respondent, Central Distributing Company, Incorporated, licensee, there was no legal authority in the State of Kentucky to collect said tax, and that the petitioners or the respondent, Central Distributing Company, Incorporated, were not liable for the payment of the tax attempted to be collected herein.

22. That Section 2 of Article 4 of the Act of 1934 provides no spirituous, vinous or intoxicating malt liquors shall be manufactured in this state for storage or sale at retail within this state after this act becaomes effective, without a permit therefore, issued by State Tax Commission as herein provided. No person shall sell vinous, spirituous or intoxicating malt liquors in this state, except as provided in this act.

Section 5 of Article 4 provides no wholesaler shall sell or contract to sell any sp-rituous, vinous or intoxicating malt liquors, who is not duly authorized under this act to receive, possess, transport, distribute or sell the same.

23. That under the above provisions of this act, no person could engage in the sale at retail or wholesale of intoxi-

cating liquors as a beverage, that the act of 1936 does not completely provide for the sale or license of intoxicating liquors in itself.

24. That at the time of the levy for the payment of the taxes by the Central Distributing Company, Incorporated, [fol. 22] licensee ,there was no existing law in the State of Kentucky, authorizing the collection of said tax, and that the levying and collection of said tax denied to the petitioners, due process of the law as hereinbefore alleged.

25. That the said Franklin Circuit Court is without jurisdiction to issue processes out of Franklin County, Kentucky, except in civil actions, under Sec. 976 of the Kentucky Statutes, and limited in its jurisdiction to enforce imprisonment penalties outside of Franklin County, Kentucky, against persons or corporations located in other counties who commit breaches of penal statutes in other jurisdictions.

26. That as to the import tax levied under the Act of 1934, and not attempted to be levied under the Act of 1938, respondents are taking from licensee daily, and impairing the security of these petitioners, an unlawful tax unauthorized by the Constitution of the State of Kentucky, and violative of Section 8 of Article I of the Constitution of the United States; and that said licensee has paid approximately the sum of Eight Thousand ($8000.00) Dollars in the last twenty (20) months to the said respondents. That said taxes are a burden on interstate commerce between states, and takes the property of petitioners' licensee without due process of law.

And that all of the proceedings and acts of respondents have been arbitrarily exercised to the great damage and injury of licensee's business, and attempted to and did confiscate licensee's profits, which were ample before the imposition of said tax of Section 4 of the Act of 1936, and which, since the imposition of said tax, have confiscated all the profits on the cheaper grades or younger grades of whiskey.

27. That at the time of the filing of this action for injunctive relief, there was no pending action in any court by the parties to this action.

28. That the Act of the Legislature of Kentucky of 1934, and the act of 1936 as enforced, complained of, denies your

petitioners due process of the laws of the United States, 14th Amendment and Section 10, Article I.

29. The petitioners respectfully suggest that the constitutional questions raised herein do involve the construction of the Constitution and the laws of the United States, and, [fol. 23] therefore, a hearing on the temporary and permanent injunction be had by three (3) judges of the Federal Court, as provided by the rules.

Wherefore, your petitioners pray that a restraining order be issued to show cause, and a temporary injunction be issued within the discretion of the court, and, finally, at a hearing, that respondents be enjoined from carrying out their intention of selling — disposing of said property, and that this court exercise its equity powers in aid of your petitioners in foreclosing its mortgage on said property, and in furtherance of the business of the Central Distributing Company, Incorporated, licensee, until and when the note referred to herein shall have been fully paid; and that the court make such orders in the premises as it shall deem just and equitable, and that the statute authorizing said taxes claimed be held invalid, and respondents be enjoined from holding a hearing to revoke licensee's permit until the final hearing of this court. Further, your petitioners saith not.

Smith & Schuberth, Henry J. Cook, Attorneys for Petitioners.

Duly sworn to by Harry Bayer. Jurat omitted in printing.

[fol. 24] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

[Title omitted]

ORDER FILING PETITION, ETC.— Filed February 26, 1938

This cause coming on for hearing on the motion of the plaintiffs to permit their filing of petition for injunctive relief, it is ordered that petition be filed for the purpose of determining the jurisdiction of the Court.

Plaintiffs are directed to deliver to the Attorney General of the Commonwealth of Kentucky copies of their petition and brief or briefs herein, and the Attorney General is allowed ten days after the receipt of such copies within which to file brief on the matters presented to the Court herein.

MacSwinsford, Judge.

Feb. 26, 1938.

[fol. 25] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

RECEIPT—Filed March 9, 1938

Received brief in the above styled case this the 8th day of March, 1938.

William Hayes.

[fol. 26] IN UNITED STATES DISTRICT COURT

CHATTEL MORTGAGE

Know All Men by These Presents:

That, Central Distributing Company, Inc., incorporated under the laws of the State of Kentucky, the Grantor, for the consideration of Three thousand Dollars ($3000.00) received to its full satisfaction of Carrie Kohn, J. W. Kohn and M. S. Kohn the Grantees, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over, unto the said Grantees, their heirs and assigns forever, the following described goods, chattels and property, now remaining and being in our possession, to-wit:

1—66" Walnut "Finish" Office Desk.
1—60" Walnut "Finish" Office Desk.
1—54" Walnut "Finish" Typewriter Desk.
1—42" Walnut "Finish" Typewriter Desk.
1—32" Walnut "Finish" Office Table.

1—6-cornered Golden Oak Office Table.
1—Walnut "Finish" Humidor with Glass Top.
1—3′ x 6½′ "Lyon" Metal Cabinet with Shelves.
1—3′ x 6′ Metal Cabinet with Shelves.
1—Mosler Iron Safe.
2—Four-Drawer "Ahrora" Metal Filing Cabinets.
1—Four-Drawer "Armor" Metal Filing Cabinet.
1—Section, Four Drawers, Metal Filing Cabinet.
1—#2000 National Cash Register and Stand.
1—#131108, "Paymaster" Check Writer.
1—9′ x 12′ Seamless Rug.
1—Royal Typewriter #X-939663.
1—Remington Typewriter #RP-62181.
2—Walnut "Finish" Swivel Office Chairs.
3—Walnut "Finish" Swivel Typewriter Chairs.
5—Office Chairs.

Including Entire Stock of Goods and Merchandise and All Other Fixtures of Whatever Kind or Nature That is Located and Situated in the Store and Basement at #45 E. Eleventh Street, Newport, Kentucky.

To Have and to Hold all and singular the goods, chattels and property above granted, bargained and sold, or intended to be granted, bargained and sold unto the said grantees, their heirs and assigns.

The condition of this mortgage is such, that whereas the said grantor has executed and delivered to the said Carrie Kohn, J. W. Kohn and M. S. Kohn a certain promissory note, of even date herewith, for the sum of $3,000.00, payable on demand from and after date hereof with interest thereon at the rate of six per centum per annum payable at #45 E. Eleventh Street, Newport, Kentucky. On failure to pay said note or interest thereon when, due, or upon demand, thereupon said note shall immediately become due and payable without further notice or demand, such further notice and demand being hereby expressly waived.

[fol. 27] It is Expressly Agreed, by and between said grantor and grantees, that if said note or the interest accrued thereon, shall not be paid within three days after falling due, then said note shall at once become due and payable, at the election of said grantees

Now if the said Central Distributing Company, Inc., its successors or assigns shall well and truly pay the aforesaid

sum of money, and interest, at the time and in the manner and form as above set forth, and shall keep and perform the covenants and agreements above contained, on its part to be kept and performed, according to the true intent and meaning thereof then this mortgage shall be void; otherwise the same shall be and remain in full force and virtue at law.

And the said grantor does hereby covenant and agree to and with the said grantees, their heirs and assigns, that in case default shall be made in the payment of the sum of money above mentioned, or in the performance of any of the above mentioned covenants at the time limited for such payment or performance; or in case grantor shall commit any waste or nuisance, or attempt to secrete or remove the above described goods or chattels, or any part thereof; or if the said grantees, their heirs or assigns, shall at any time before said sum of money becomes due, deem it necessary for their more complete and perfect security, the said grantees, their heirs and assigns, are hereby authorized and empowered, with or without the aid of assistance of any person or persons, to enter the dwelling house, store or other premises of said grantee, or such other place or places as the said goods or chattels are or may be placed, and take and carry away said mortgaged property, and sell and dispose of the same at public auction or private sale, at once, without notice, and out of the money arising therefrom to retain and pay the said indebtedness above mentioned, and all charges touching the same, or to reatin a sufficient amount of money arising from such sale, necessary to indemnify the said grantees for any damages by them sustained by reason of the violation of any of the aforesaid covenants on the part of the grantor; shall also pay out of the proceeds of said sale all proper and reasonable costs, attorney's fees and expenses incurred in the premises, including all costs and expenses incurred in pursuing, searching for, taking, removing, keeping, storing and selling said property, and may pay all liens thereon having precedence over this mortgage, rendering the overplus (if any) to the said grantor, its successors or assigns; and until default shall be made in the payment of said indebtedness or breach shall have been made in the performance of any of said covenants on the part of said grantor, the said grantor to remain and continue [fol. 28] in the quiet and peaceable possession of the said goods or chattels, and in the full and free enjoyment of the same.

In Witness Whereof, we hereunto set our hand, this 9th day of February A. D. 1937.

Central Distributing Company, by William Ploss, Pres., by R. Webster, Secy. (Seal.)

Signed and acknowledged in presence of Elsie M. Dewald.

STATE OF KENTUCKY,
County of Campbell, sct:

I, Elsie M. Dewald, a Notary Public, in and for said county and state, do certify that the within and foregoing instrument of writing from Central Distr. Co., Inc., to Carrie Kohn, J. W. Kohn, and M. S. Kohn, was this day produced to me by the parties in said county and state and then and there acknowledged by said William Ploss and R. Webster, Pres. and Secretary, respectively, of Central Distr. Co., Inc., to be their act and deed.

Given under my hand and seal of office this 9th day of February, 1937.

Elsie M. Dewald, Notary Public. My commission expires 10/9/40. (Seal.)

[fol. 29] $3000.00. February 9, 1937.

On demand after date, for value received we promise to pay to the order of Carrie Kohn, J. W. Kohn and M. S. Kohn, Three Thousand 00/100 Dollars, with interest thereon at the rate of six per centum per annum, payable on demand interest being payable at #45 E. Eleventh St., Newport, Kentucky, and is secured by a chattel mortgage on fixtures and merchandise. On failure to pay said note or interest thereon, when due or upon demand thereof, thereupon said note shall immediately become due and payable without further notice or demand, such further notice and demand being hereby expressly waived.

And we hereby authorize any Attorney-at-Law to appear in any Court of Record in the State of Ohio, or in any other State in the United States, after the above obligation becomes due, and waive the issuing and serving of process and confess a judgment against us in favor of the holder hereof for the amount appearing due, and costs of suit; and thereupon to release all errors and waive all right of appeal.

Central Distributing Company, Inc., by William Ploss, Pres., by R. Webster, Sec'y.

"Exhibit A."

[fol. 30] STATE OF KENTUCKY,
Campbell County, sct:

I, Geo. J. Kaufmann, Clerk of the County Court within and for the County and State aforesaid, the same being a Court of Record, having a Seal and having Jurisdiction of the Probate of Wills and the appointment and qualification of Executors, Administrators, Guardians and other Fiduciaries, do hereby certify that the foregoing and hereto attached writing contains a full and complete copy of the Chattel Mortgage from the Central Distributing Company, Inc., to Carrie Kohn, J. W. Kohn and M. S. Kohn, as the same appears of record in Chattel Mortgage Book No. 18 Page 491 File No. 977, Campbell County Kentucky Records at Newport, Kentucky, as fully as the same appears from the Records on file in my office.

In Testimony Whereof, I have hereunto subscribed my hand and affixed the Seal of said Court at my office in Newport, Kentucky, this 1st day of March A. D., 1938.

Geo. J. Kaufmann, Clerk, by William A. Otting, Jr., D. C.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF M. MCDOWELL—Filed April 11, 1938

The affiant deposes on oath and says that he is acquainted with the market value before and since the imposition of the tax of $3.12 per case imposed by the legislative act of 1936. That prior to the enactment of said act, the retail and wholesale business prosperous in Kentucky, but that since the passage of said act more than half of the wholesalers and retailers have gone out of business in the counties of Campbell and Kenton counties in Kentucky.

That a tax of $1.04 on the medium and lower grades of whiskey as to age is confiscatory, this whiskey being marketable at from 45 cents per gallon to $1 per gallon or as cases from $13 per case with the tax to $18 per case with the tax.

The concumption in all the retail stores where this affiant has inquired complain that the buyers will not pay the price including the tax and that prior to the imposition of the tax business was good and there was a good price in this

class of whiskies, which today has fallen into disgrace and is a loss to most wholesale and retail operators. Fifteen year old cased whiskey of the Bourbon type, made in Kentucky is worth about $70 per case and four year bonded whiskey is worth about $31 per case, while six months old whiskey is worth about from $12 to $13 per case including tax.

That your affiant believes that the tax has been ruinous to the medium and cheaper grades of whiskey, less-ing and destroying in most cases all of the profit because the public will not buy at the price plus the tax, and this kind of whiskey composes seventy-five per cent of the bulk of whiskey sold at wholesale and retail.

M. McDowell.

Subscribed and sworn to before me this the 7th day of April, 1938. W. A. Schuberth, Notary Public Hamilton County, Ohio. My commission expires June 26, 1940.

[File endorsement omitted.]

[fols. 32-34] In United States District Court

Affidavit of A. O. Pieper—Filed April 11, 1938

Affiant, A. O. Pieper, deposes on oath and says that he is a Wholesaler in spiritous liquors in Covington, Kenton County, Kentucky, that he has been in said liquor business in said county and state since the year of 1934; that he is well informed with reference to the business aforesaid, the wholesale prices of whiskey and the tax assessed against same by the Department of Revenue of the State of Kentucky; that the price per case on one of the cheapest whiskies, namely, West Point, is $9.00 per case of quarts, and the price on Old Grandad or Old Taylor is $30.12 per case of quarts, and the price on 15 year old Sunnybrook is $70.00 per case of quarts, that the tax assessed by the State of Kentucky on whiskey sold in the State is $1.04 per gallon, or $3.12 per case; that the same tax is assessed on whiskey named West Point, the lowest priced; Old Taylor, Old Grandad, the medium priced; and on the 15 year old Sunnybrook, the highest priced; that the requirements are

to affix on quart bottles of whiskey a twenty-six cent stamp, on pint bottles of whiskey a thirteen cent tax stamp, and on half-pint bottles of whiskey a seven cent tax stamp; that the tax on a case of quarts of whiskey is $3.12; that the tax on a case of pints is $3.12, and that the tax on a case of half-pints is $3.36, regardless of the value of the whiskey or spiritous liquors; that after the enactment of the 1936 tax act, which levied the aforementioned tax on whiskies or spiritous liquors, the profit was greatly curtailed to the wholesaler as well as the retailer on the cheaper grades of whiskey sold, that the profit on the other grades of whiskey was also greatly reduced, thus causing many and divers wholesalers and dispensers who were operating prior to the enactment of the 1936 tax act, to suspend operations, and compelling them to discontinue their business upon which they spent large sums of money to build up, by reason of a great many consumers having formerly purchased their whiskies and spiritous liquors from retailers in the State of Kentucky, and by reason of said tax, having diverted their purchases to other neighboring states on account of it being impossible for a retailer in the state of Kentucky to compete with the prices of other states on account of the aforementioned tax.

A. O. Pieper.

Subscribed and sworn to before me this 5th day of April, 1938. Eleanor Webster, Notary Public, Kenton County, Kentucky. My commission expires 1/11/40.

[File endorsement omitted.]

[fols. 35-36] [File endorsement omitted]

In United States District Court

[Title omitted]

Affidavit of Harvey H. Smith—Filed April 11, 1938

The affiant Harvey H. Smith deposes on oath and says that he is a member of the bar of the Supreme Court of the United States and of the Court of Appeals of Kentucky and counsel for the plaintiffs above named. That he received

the attached charges against the Central Distributing Company, Licensee, defendant and has examined the same.

That Exhibit A was received about the 1st day of March from the Central Distributing Company Inc. Licensee defendant, which charges a violation of the Act of 1934 repealed on March 3 thereafter, and for violation of the Act of 1936.

On April 6th, 1938 affiant received from Plaintiffs the exhibit B which shows that the charges of violating the Act of 1934 are attempted to be carried over under the Act of 1938, though said Act has been repealed.

The charges for said hearing are before Theo. Hageman, Director Division of Alcoholic Control.

The Second notice of a hearing, the same hearing, is to be had before the Kentucky Alcoholic Beverage Control Board in the new capital, an entirely different organization created by law since the first charges were made, and said officials are none of the officials who were to hear said proceedings in Frbry. as per notice.

This affidavit is offered in evidence for the purpose of showing and proving the allegations of Plaintiff's petition that said tax is attempted to be collected in denial of due process.

Harvey H. Smith.

Subscribed and sworn to before me this the 7th day of April, 1938. W. W. Schuberth, Notary Public, Hamilton County, Ohio. My commission expires, June 26, 1940.

[fol. 37] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HENRY J. COOK—Filed April 11, 1938

Affiant, Henry J. Cook, deposes on oath and says that he is a practicing attorney in Newport, Campbell County, Kentucky; that he was and is one of the attorneys for the Central Distributing Company, Incorporated; and that on the — day of February, 1938, he received a copy of a peti-

tion which was filed in Franklin Circuit Court, styled, "Commonwealth of Kentucky, by and on relation of James W. Martin, Commissioner of Revenue, vs. Central Distributing Company, Incorporated", and that said petition contained the following allegation:

[fol. 38] "Wherefore, plaintiff prays judgment against the defendant, Central Distributing Co., Inc., a corporation, for the sum of $3,191.89, plus the further sum of $638.38 penalty as provided by Section 4281c-22, Carroll's Kentucky Statutes, Baldwin's 1936 Edition, and the further sum of $638.38 penalty as provided by Chapter 21 of the Acts of the Fourth Extraordinary Session of the General Assembly of Kentucky of 1936-1937, plus interest on said taxes from the respective due dates thereof at the rate of 6% per annum until paid."

Henry J. Cook.

Subscribed and Sworn to, before me by Henry J. Cook, this 11th day of April, 1938. Agnes M. Hearn, Notary Public, Campbell County, Kentucky. My commission Expires July 4, 1941.

[fol. 39] AFFIDAVIT EXHIBIT "A"

February 28, 1938.

Central Distributing Company, Newport, Kentucky.

GENTLEMEN:

Pursuant to powers invested in me by the Kentucky Alcoholic Control Act of 1934 and the Reorganization Act of 1936, you are hereby cited to appear before me in the New Capitol, Frankfort on Friday, March 4, at 10 o'clock to show cause why your Wholesale Liquor License No. 56 should not be revoked.

Numerous complaints have been received against your continued operations as a Wholesale liquor dealer. The following charges will be presented against you at the hearing specified:

1. The Central Distributing Company has failed to pay the consumers' tax imposed by the Kentucky Alcoholic Beverage Tax Law of 1936, codified in Carroll's Kentucky

Statutes, 1936 Revision, as Sections 4281c-1-23. The claim for delinquent taxes based upon an audit completed by field representatives of the Department of Revenue is now pending in court. Evidence of this liability, as well as others, may be presented.

2. You are charged with selling spirits in Kentucky in containers to which the consumers' tax stamps have not been affixed, as required by Sections 4, 5, 6, 10, and 13 of the above mentioned law.

3. The Central Distributing Company is further charged with selling spirits in Kentucky to persons who are not licensed in Kentucky or by any other state authority. This practice is in violation of Article IV, Section 5 of the Alcoholic Control Act of 1934, codified in Carroll's Kentucky Statutes, 1936 Revision, as Section 2554b-15, Section 8 of the Alcoholic Beverage Tax Law of 1936, and Regulation Ch-3 adopted by this Department and the Department of Revenue on February 7, 1938. Evidence will show that non-licensed persons drive to your place of business, obtain liquor and transport the same to an unknown destination.

[fol. 40] 4. Various charges relating to the collection and administration of liquor taxes will also be presented. You have imported spirits without having a valid import permit, as required by Section 421a-17 of Carroll's Kentucky Statutes, 1936 Revision, according to compliants received. It is charged that you have failed to abide by the regulations of the Department of Revenue, among which is one requiring the return of green triplicates of import permits within 90 days from the date of issuance. It will also be shown that you have failed to comply with requests of the Department of Revenue relative to liquor tax reports and the supplying of information of the same or similar nature.

Charges against your continued operation as a Wholesale Liquor licensee will be made formally at the hearing mentioned above. You will appear prepared to make any defence you can.

Very truly yours, Theo. Hageman, Director Division of Alcoholic Control.

TH:TH.

CC.: Department of Revenue.

FCL. Copy

[fol. 41] AFFIDAVIT EXHIBIT "B"

COMMONWEALTH OF KENTUCKY

Department of Revenue, Frankfort

April 5, 1938.

Central Distributing Company, Newport, Kentucky.

GENTLEMEN:

Pursuant to Sections 43, 44 and 119 of the Kentucky Alcoholic Beverage Control Law of 1938, you are hereby cited to appear before the Kentucky State Alcoholic Beverage Control Board in the New Capitol at Frankfort on Wednesday, April 13, at 10:00 o'clock to show cause why your Wholesale Liquor License No. 56 should not be revoked.

You will come prepared to answer complaints relative to violations of the Kentucky Alcoholic Control Law of 1934 and the Kentucky Alcoholic Beverage Tax Law of 1936. The following charges, as indicated in our letter of February 28, will be presented against you at the hearing specified:

1. The Central Distributing Company has failed to pay the consumers' tax imposed by the Kentucky Alcoholic Beverage Tax Law of 1936, codified in Carroll's Kentucky Statutes, 1936 Revision, as Sections 4281c-1-25. The claim for delinquent taxes based upon this audit completed by field representatives of the Department of Revenue is now pending in court. Evidence of this liability, as well as others, may be presented.

2. You are charged with selling spirits in Kentucky in containers to which the consumers' tax stamps have not been affixed, as required by Sections 4, 5, 6, 10, and 13 of the above mentioned law.

3. The Central Distributing Company is further charged with selling spirits in Kentucky to persons who are not licensed in Kentucky or by any other state authority. This practice is in violation of Article IV, Section 5 of the Alcoholic Control Act of 1934, codified in Carroll's Kentucky Statutes, 1936 Revi. ion, as Section 2554b-15, Section 8 of the Alcoholic Beverage Tax Law of 1936, and Regulation

Ch-3 adopted by this Department and the Department of Business Regulation on February 7, 1938. Evidence will show that non-licensed persons drive to your place of business, obtain liquor and transport the same to an unknown destination.

[fols. 42-44] 4. Various charges relating to the collection and administration of liquor taxes will also be presented. You have imported spirits without having a valid import permit, as required by Section 4214a-17 of Carroll's Kentucky Statutes, 1936 Revision, according to complaints received. It is charged that you have failed to abide by the regulations of the Department of Revenue, among which is one requiring the return of green triplicates of import permits within 90 days from the date of issuance. It will also be shown that you have failed to comply with requests of the Department of Revenue relative to liquor tax reports and the supplying of information of the same or similar nature.

Evidence to support each charge will be presented at the hearing. You will come prepared to make any defence you may.

Very truly yours, H. Clyde Reeves, Executive Assistant.

JBW:TH.

[fol. 45] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR JUDGMENT ON AMENDED PETITION—Filed April 11, 1938

Come now the petitioners, and move the court for judgment on the amended petition of petitioners, and in this behalf submit evidence.

Smith and Schuberth, Henry J. Cook, Attorneys for Petitioners.

[fols. 45a-45b] In United States District Court

[Title omitted]

Motion to Dismiss—Filed April 16, 1938

Comes the defendants, Commonwealth of Kentucky, by and on relation of James W. Martin, Commissioner of Revenue, and Louis C. Sickmeier, Sheriff of Campbell County, Kentucky, and move the Court to dismiss plaintiffs' petition as amended; and as reasons for said motion state that plaintiffs herein have a plain, adequate and complete legal remedy and that this Court is without jurisdiction to grant the relief prayed for in plaintiffs' petition as amended.

Wherefore, these defendants pray that the petition as amended herein be dismissed.

Hubert Meredith, Attorney General, Commonwealth of Kentucky, by William Hayes, Assistant Attorney General. Clifford E. Smith, J. J. Leary, General Counsel, Department of Revenue.

[File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

[fol. 46] In United States District Court for the Eastern District of Kentucky

J. W. Kohn, M. S. Kohn, and J. W. Kohn, Administrator of the Estate of Carrie Kohn, Petitioners,

v.

Central Distributing Company, Inc., 45 E. 11th Street, Newport, Kentucky, and the Commonwealth of Kentucky, by and on the Relation of James W. Martin, Commissioner of Revenue, and L. C. Sickmier, Sheriff of Campbell County, Kentucky

Judgment and Order Allowing Appeal

This cause coming on for hearing before the Honorables Elwood Hamilton, United States Circuit Judge, John D. Martin, United States District Judge, and Mac Swinford,

United States District Judge, on the motion of the petitioners for a temporary and permanent injunction, and the petitioners being present by counsel H. H. Smith and Henry Cook, and respondents being present by counsel J. J. Leary and William Hayes, Assistant Attorney General for the Commonwealth of Kentucky; and the Court being fully advised, it is ordered, adjudged and decreed that the temporary and permanent injunction of petitioners be denied, and the motion of petitioners for said injunction be and is hereby overruled; and the petitions of the petitioners are dismissed, to all of which petitioners object and except.

It being the opinion of the court that the legislative act of 1934, entitled "Kentucky Alcohol Control Act", furnishes petitioners an adequate remedy in Section Twelve (12) [fol. 47] of said Act to contest the validity of said Act and to recover any taxes collected from them by the State of Kentucky under said Act.

Petitioners, by their counsel, announced that they wished to appeal to the Supreme Court of the United States from the judgment, order and decree of this Court, and give notice in open court to that effect; which appeal is now granted and allowed by the Court.

Enter this 16th day of April, 1938.

Elwood Hamilton, United States Circuit Judge.
John D. Martin, United States District Judge.
Mac Swinford, United States District Judge.

[fol. 48] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

Come now the appellants herein, the petitioners in the court below, and considering themselves aggrieved by the decision of the three-judge United States District Court hearing in the above entitled cause, hereby pray that an appeal may be allowed to the Supreme Court of the United States, herein, and for an order fixing the amount of the bond thereon. Appellants attach hereto, as a part of this petition, their Assignment of Errors.

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Come now the appellants and in connection with their appeal to the Supreme Court of the United States, from the hearing of the Honorable three Judges in the Eastern District on April 16th, 1938, and say that in the record and the proceedings and in the final judgment and decree and order thereof, manifest error has intervened to the pred*j*udice of appellants, and for said errors assign:

Assignment of Errors

[fol. 50] I. The Court erred in not issuing the Injunction, both temporary and permanent.

II. The Court erred in holding that the Petitioners had an adequate remedy at law under Section 12 of the Act of 1934, entitled, "Kentucky Alcohol Control Act", enacted March 17, 1934, by the General Assembly of Kentucky.

III. That the Court erred in not holding that the Kentucky Alcohol Control Act as applicable to Petitioners' allegations in its said petition and amended petition was an unconstitutional and invalid Act, violative of Amendment 7 of the Constitution of the State of Kentucky, at the time of its enactment.

IV. That the Court erred in not holding that the section 4 of the Act of 1936, levying a tax of $1.04 was an invalid Act of tax levy against petitioners' licensee's business, in medium and younger whiskies, violative of Sections 171, 172, 174 and 181 of the Constitution of Kentucky, discriminative, confiscatory, lacking in uniformity, a double tax on property prohibited by the 14th Amendment to the Constitution of the United States, denying equal protection of the laws and due process of the laws.

V. The Court erred in its judgment and decree to which Petitioners objected and excepted.

VI. The Court erred in not holding that the Franklin Circuit Court had no jurisdiction of the subject matter of the action, as shown in Petitioners' Amended Petition, or the parties.

[fol. 51] VII. The Court erred in not issuing an injunction against the said James W. Martin, Revenue Commissioner of the State of Kentucky, from holding a hearing to revoke Central Distributing Company's license, based on charges accruing, if at all, under the Act of 1934.

VIII. The Court erred in not holding that the United States District Court for the Eastern District of Kentucky had jurisdiction of this cause of action to determine mortgagee's lien rights, on the ground of the diversity of citizenship, and in dismissing Petitioners' petition and the cause of action.

IX. The Court erred in not holding that the $8000.00 import tax collected from the Central Distributing Company, Incorporated, was illegal and should be paid to the Central Distributing Company, Inc., violation, being of Section 8, Article I, of the Constitution of the United States, a burden on Interstate Commerce.

X. The Court erred in not sustaining each and every ground of the allegations set out in Petitioners' Amended petition as a denial of due process, the equal protection of the laws and a violation of Sec. 8, Article I, of the Constitution of the United States.

XI. That the petitioners have no adequate remedy at law for wrongs committed against them and its licensee, and unless these wrongs are redressed by the process of the Federal Court, Petitioners will suffer irreparable damage and injury in the said business on which, they hold mortgage lien, superior to the state of Kentucky's claim.

Harvey H. Smith, Henry J. Cook, Attorneys for Appellants.

April 16, 1938.

[fols. 52-61] For which errors herein assigned, your petitioners pray that the said judgment, decree and order of the United States District Court for the Eastern District of Kentucky, three judges sitting, dated April 16, 1938, in the above entitled cause, be reversed, and a judgment rendered in favor of the said petitioners, and for their costs.

Smith and Schuberth, Henry J. Cook, Attorneys for Appellants.

Received copies of the within petition in error and assignment of errors and accepted notice of the filing thereof this April 18, 1938.

Hubert Meredith, Attorney General Com. Ky., by William Hayes, Asst. Attorney General; J. J. Leary, Counsel Revenue Department, Commonwealth of Kentucky.

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is stipulated and agreed by and between the parties to this action and their counsel respectively that the following papers, part of the record in this cause shall be and constitute the record on appeal to the Supreme Court of the United States, as follows:

Exhibits a, b, c, d, e, f, g, h.
Amended petition.
Order February 26, 1938.
Notice of service on attorney general.
Chattel mortgage and note.
Affidavits of McDowell, Peiper, Smith, Macke, H. H. Smith, Bayer, Cook and Exhibit- A and B charges of the state for violations of state law.
Order filing affidavits.
Motion for temporary restraining order and Motion for permanent Injunction.
Order denying of three judges and allowing appeal.
Petition on Appeal and attached assignment of errors.
Order filing petition on Appeal.
Bond on Appeal.
Acceptance of Notice.
Order to file jurisdictional grounds.
Motion to file jurisdictional grounds.
Petition stating grounds and supporting statute and authorities.
This stipulation.

You have all off these papers except possible statement of jurisdictional grounds, which I can send you.

William Hayes, Asst. Attorney General. J. J. Leary, Attorney for Department of Revenue. H. H. Smith, Henry Cook, Attorneys for Appellants.

[fols. 63-65] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 66] SUPREME COURT OF THE UNITED STATES

[Title omitted]

DESIGNATION OF RECORD TO BE PRINTED—Filed October 26, 1938

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

The appellants and each of them respectfully designate the essential portions of the record to be printed as pertinent and necessary to the determination of the vital questions of the record as presented, and on the issues as made:

1. The Amended Petition of the Plaintiffs:
2. The affidavits in support of the petition as amended.
3. These are:

a. Louis P. Holthamer: b. Miller McDowell: c. A. O. Peiper: d. Harvey H. Smith: e. Henry J. Cook.

4. Order of the Court permitting the filing of the amended petition, by Judge Swinford.
5. Mortgage of the Central Distributing Company Inc. to J. W. Kohn et al.
6. Motion for judgment April 11th, 1938, on the pleadings and the record.
7. Order of Judge Swinford April 12, 1938, for a hearing [fol. 66a] before Three judges of the United States District Court.
8. Order and judgment denying injunction April 16th, 1938.

9. Defendants motion to dismiss Amended Petition, April 16, '38.

10. Notice of Appeal.

11. Statement of grounds of jurisdiction.

12. Praecipe for Record.

13. Order allowing appeal and assignment of errors and bond.

14. The Assignment of Errors.

15. Stipulation as to record and waving citation.

16. Citation June 9th, 1938.

17. Section 172 of the Constitution of Kentucky.

18. Section 171—first twelve lines of Exhibit C thereof as shown in statement of jurisdiction. (Constitution of Kentucky)

19. Exhibit B. being section 976 of the Kentucky Statutes, Carrolls Revised. Set out in Statement of Jurisdiction, page 7.

20. Exhibit A being section 63 as set out in statement of jurisdiction, page 7. Carrolls Code of Kentucky.

21. Designated in the order of the court as section 12, in fact section 2 of the Act of 1934 reading as follows, inclusive of sec. 2554-64 Chap. 146, Art. 6—sec. I, March 17, '34:

"No suit shall be sustained in any court to restrain or delay the collection or payment of any fee or tax levied by this Act.

The aggrieved taxpayer or permittee shall pay the tax or fee as and when required and may at any time within two years from the date of such payment sue the commonwealth through its agent, the Auditor of Public Accounts, in an action at law in any court, State or Federal, otherwise having jurisdiction of the parties and subject matter for the recovery of the tax or fee paid with legal interest thereon from the date of payment. If it is finally determined that said tax or fee or any part thereof was wrongfully collected, for any reason, it shall be the duty of the Auditor of Public Accounts to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax or fee so adjudged to have been wrongfully collected, together with legal interest thereon. The Treasurer shall pay the same at once out of the general expenditure fund of the state in preference to other warrants or claims against the Commonwealth. A separate suit need not be filed by each separate individual payment made by any taxpayer, but a recovery

may be had in one suit for as many payments as may have been made."

22. Section — of the statutes of Kentucky (Carrolls) providing a tax under section 172 of the Constitution of Kentucky, as follows:

"There is hereby levied upon the sale or distribution by sale or gift a tax of one dollar and four cents ($1.04) on each wine gallon of spirits, and a like or proportional rate per gallon on spirits sold or distributed in any other container of more or less than one gallon."

[fol. 66b] 23. Section 4214 a-17 of the Kentucky (Carroll's) Statutes, provide for a tax on imports, whic- is as follows:

"Every person who purchases distilled spirits, and has same shipped into the state of Kentucky from points without the state as provided in section 5 hereof shall at the same time said permit is issued pay a license tax thereon of 5¢ per gallon."

24. Section 172 of the Constitution of Kentucky provides that,

"All property shall be assessed at its fair cash value at what it would bring at a voluntary sale."

25. Section 174 of the Constitution of Kentucky provides that,

"All property, whether owned by natural persons or corporations shall be taxed in proportion to value, unless exempted by this Constitution, and all corporations shall pay the same rate of taxation paid by individual property."

Respectfully submitted for printing of the record,
Harvey H. Smith, Smith and Schuberth, William A. Schuberth, Attys. for J. W. Kohn et al.

Service of copy of the above and foregoing designation to print is hereby acknowledged.

—— ——, Attorneys for Appellees.

[fol. 66c] [File endorsement omitted.]

[fol. 67] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED ON IN APPEAL—Filed November 12, 1938

The Appellant relies on the following points on appeal designated in their Petition in Error, and shown on the record as printed.

1. Section 380 of the Judicial Code provides for injunctive relief against a proceeding by state officer imposed on an individual or a corporation under the authority of an unconstitutional statute where the damage is immediate and irreparable.

We rely on the United States Supreme Court authorities and the record showing special levy for taxes and penalties on property mortgaged to Appellants, when such taxes, alleged, were declared by J. W. Martin, Internal Revenue officer, and acting under authority of the state of Kentucky, and a statute contrary to the Constitution of Kentucky—sections 109-125-126 where the exercise of judicial power is limited to the courts, and penalties declared without judicial hearing, a denial of due process and equal protection of the laws of Kentucky. Violates 14th Amendment.

2. Section 72 of the Code of Civil Practice of Kentucky provides for the jurisdiction of the Circuit Courts of Kentucky to be at the place of business of the corporation or its Service Agent, and that the issuing Court, Franklin Circuit Court has jurisdiction only of civil actions, section 63 of Carroll's Code of Practice, and section 976 of Carroll's Kentucky Statute, and Section II of its Criminal Code, which confines its jurisdiction to Civil causes under civil statutes—its proceeding here being under a criminal statute. Section 22 of the original Act 1934 and 1936 provides for a fine of $50 and as much as $1000; a jail sentence of one month, and as much as one year. To seize property by order of a court acting in excess of its jurisdiction, violates section 109 of the Constitution of Kentucky and section 126 of the [fol. 68] Constitution of Kentucky: And the 14th Amendment relying on sub section 29 and 59 of the Constitution of Ky., which prohibits special legislation and delegation of power, secs. 60 and 3. also relied on. 4214-d-14 (Kentucky Statute).

3. That Appellant relies on the fact, section 2 of the Act of 1934 March 7th, does not provide an adequate remedy for

the recovery of unconstitutional taxes, in that, suit must be brought, and the tax paid in advance of sales on domestic liquors, not imported, and taxes also must be paid in advance of importation of liquors from without the state at the rate of five cents per gallon, and permits may be refused for such importations by a state official, thereby burdening interstate commerce of such individuals engaged in wholesale importations: and said provisions attempts to and does limit the bringing of said suit to recover import taxes within two years, and if suit is brought to recover taxes, and the wholesaler is still in business, his license permit will be promptly revoked. This Act of 1934 is to be relied on as repealed and not properly carried into another Act under the Constitution of Kentucky, sections 51 sub. 29 of 59—60 and if not repealed, then it gives the Court the discretion to issue Mandamus to the Auditor should he refuse for any reason to pay the tax. We rely on this point as a denial of an adequate remedy at law for recovery of unconstitutional taxes, it providing for no allowance of attorney's fees. These allegations were undenied. Sec. 4214-a-16, Act of Sept. 26, '33—4214-a-23 and sec. 4214-d-12 (Ky. St.)

4. The seizure by the Sheriff on an order of the Circuit Court of Franklin County, Kentucky, of Appellants property and business, and closing it, gave the Appellants, who held a mortgage on the assets no chance to enforce their mortgage and collect their note, and impaired their contract with Central Distributing Company, Inc., contrary to section 19 of the Constitution of Kentucky and the Constitution of the United States. Amendment 14 (U. S. Con.).

5. Appellants motion for judgment should have been sustained. Relied on.

6. There is diversity of citizenship, giving the Court jurisdiction to foreclose mortgage for Appellants, para-
[fol. 69] graphs one and two of Appellants Amended Petition, and Mandatory injunction, to release said assets and business, was the only adequate remedy.

7. Arbitrary seizure of mortgaged property, paragraph 4 of the Appellant's Amended Petition, on which Appellant's Mortgagor had paid import taxes, and which was moving in Commerce, and these taxes attempted to be collected constituted a violation of Art. I Section 8 of the Con-

stitution of the United States by imposing a domestic tax burden on it, the state of Kentucky then having in its possession, in excess of $9000 of money, the property of the Central Distributing Company, Inc., which it had refused to return to Appellant's Mortgagor, and which, when Appellants made their motion for judgment was undenied, and Appellants therefore were entitled to an injunction on its confessed allegations, at the time of making said motion for judgment, after failure of Appellees to deny the allegations therein.

8. Import taxes laid on commerce between the states are void; this allegation of Amended petition that mortgagees relied for payment upon the collection of the import taxes then due Mortgagor. We rely on this issue as admitted and undenied on the hearing on the merits of the action. Sec. 4214-16 and 4214-a-17 (Kentucky Stat.)

9. The enforcement of the legislative Act of 1938, March 7th, to enforce the terms of the Act of March 17th, 1934, repealed after this action was filed, was contrary to the Constitution of Kentucky-Expost Facto, sec. 19.

10. There was no adequate remedy to prevent cancellation of Mortgagor's license for non payment of taxes, not constitutional, without first determining in a court of record whether such taxes were validly assessed, and whether said penalties were validly assessed by a competent Court. Neither 1934 and 1938 Act provided for Judicial hearing. Constitution of Kentucky—secs. 26, 27, 28, 109.

11. Sections 26, 27, 28 and 109 of the Constitution of Kentucky reflect the limitations of delegated judicial power. We rely on these sections as prohibiting arbitrary enforcement [fol. 70] penalties and or taxes, being not found by a judicial body, and the Revenue Commissioner is not qualified under the Constitution to assume such judicial power; and in this respect Appellants were deprived of their property without due process—14th Amendment to the Constitution of the United States; injunctive process, was Appellants only remedy that was adequate. "Injunction to prevent collection of an illegal tax is the only adequate remedy"; Brady vs. Bannon 134 Kentucky, Page 769. We rely on this issue made and confessed by failure to deny Amended petition. 18 sub. 4 of 59, Kentucky Constitution.

12. A repealed Act, the 1934 Act, licensed Central Distributing Company, and its privileges were under that Act, and its offenses by which any legal authority of the state might impose penalties repealed with it, and with its repeal, prosecutions then pending, died.

13. The taxes levied on Imports, which left the Mortgagor allegedly in debt to the state of Kentucky, $3150, for state taxes under that portion of the Act of 1936, authorizing one dollar and four cents per gallon, or approximately taxes on nine hundred and fifty cases of liquors, violated section 8 of Art. I, of the Constitution of the United States. Disregard of payment of import taxes by state officials denied due process.

14. The taxes levied of Thirty One Hundred and Fifty dollars at $1.04 per gallon were illegal, and violated sections 171, 172, 174, and 181 of the Constitution of Kentucky, in that said taxes were not levied on the fair cash value of the whiskey, lacked uniformity; were discriminatory as to newer grades, and confiscatory, in that whiskey of the value of forty five cents paid the same tax as pre war whiskey, valued at Eighteen dollars per gallon, and was an advalorem tax and not an excise tax under the Constitution of Kentucky. A manufacturers tax of five cents per gallon was levied at the same time, which is an advalorem tax. Two advalorem taxes cannot be levied under the Constitution of Kentucky. Sec. 181, (192 Ky. Rep. 36 294 U. S. 550, 7 Fed. Supp., 438) (Kentucky Stat. sec. 4022-4020).

[fol. 71] 15. The foregoing points are relied on as a denial of guaranteed rights to the individual citizen against the imposition by the *the* Legislature of Kentucky and official representatives of the state of Kentucky, by which unlawful and oppressive Acts these Appellants were and are deprived of their property and all of which are repugnant to the provisions of the Constitution of the United States.

Respectfully Submitted, Member Supreme Court: Harvey H. Smith, William A. Scuberth, Henry J. Cook, Attorneys for Appellants; Harvey H. Smith.

Copy of the foregoing Points served on me this day—Nov. — 1938 and service by copy acknowledged.

—— ——, Attorneys for Appellees.

STATE OF KENTUCKY,
Franklin County:

The affiant, Frank M. Dailey, Jr., states that he is an attorney-at-law and that he delivered on this day a carbon copy of the within and foregoing Points and Authorities relied on in the appeal in the within styled cause pending in the Supreme Court of the United States to J. J. Leary, an Attorney in the office of Clifford E. Smith and an associate of said Smith.

Frank M. Dailey, Jr.

Subscribed and sworn to before me by Frank M. Dailey, Jr., this 10 day of November 1938. Lucille Eddins, Examiner Franklin Co., Ky.

[fol. 72] [File endorsement omitted.]

Endorsed on cover: File No. 42,662. E. Kentucky, D. C. U. S. Term No. 177. J. S. Kohn, M. S. Kohn and J. W. Kohn, Administrator- of the Estate of Carrie Kohn, Deceased, appellants, vs. Central Distributing Co., Inc., and the Commonwealth of Kentucky, etc. et al. Filed July 5, 1938. Term No. 177, O. T., 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 177

J. S. KOHN, M. S. KOHN AND J. W. KOHN, ADMINISTRATOR OF THE ESTATE OF CARRIE KOHN, DECEASED,
Appellants,

vs.

CENTRAL DISTRIBUTING CO., INC., AND THE COMMONWEALTH OF KENTUCKY, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

STATEMENT AS TO JURISDICTION.

HARVEY H. SMITH,
WILLIAM A. SCHUBERTH,
HENRY J. COOK,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 177

J. W. KOHN, M. S. KOHN, ET AL.,

Appellants,

vs.

CENTRAL DISTRIBUTING COMPANY, INC.; J. W. MARTIN, REVENUE COMMISSIONER OF KENTUCKY; STATE OF KENTUCKY; L. C. SICKMIER, SHERIFF, CAMPBELL COUNTY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FROM THE EASTERN DISTRICT OF KENTUCKY.

APPELLANTS' STATEMENT OF GROUNDS FOR JURISDICTION ON APPEAL AND SUPPORTING AUTHORITIES.

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

The above appellants and each of them, in support of the jurisdiction of the Supreme Court of the United States

to review the above entitled cause, and the final judgment and decree therein, on appeal, and particularly disclosing the grounds therefor, respectfully represent:

(a) In accordance with paragraph I of Rule 12 of the rules of the Supreme Court of the United States, the Appellants hereby suggest the jurisdiction of this Honorable Court to be Section 380 of Title 28 of the Code of the United States, and Section 266 of the Judicial Code, amended. This Section of the Code being based on the alleged unconstitutionality of State statutes, wherein the appellants are injured by the enforcement of laws of the State of Kentucky believed to be a violation of the Constitution of said State, and repugnant to the 14th Amendment of the Constitution of the United States and Section 8 of Article one thereof. And wherein appeal is authorized from the ruling of a three-judge ruling in respect of a temporary and permanent injunction (Section 266 of the Judicial Code, as amended by Act of February, 1925, C. 229, Section I, 43 Statutes 938). And especially that portion of said section which reads as follows:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case; and taken from a final decree granting or denying a permanent injunction in such suit."

That the statutes of Kentucky involved, and as we believe invalid, are the "Kentucky Alcoholic Control Act and the Whiskey Tax Law", of said State, all of which are set out in Exhibit A, attached to this statement, and the "Kentucky Alcoholic Beverage Tax Law", marked Exhibit B. And the Alcoholic Beverage Control Law, enacted March 7, 1938, by the General Assembly of Kentucky, being H. B. 129.

(b) That there is also involved a construction of Section 8, Article one of the Constitution of the United States and Amendment 14 of the United States Constitution; and 976 of the Kentucky Statutes, relating to the jurisdiction of the Franklin Circuit Court of Franklin County, Kentucky, and Section 59 of the Constitution of Kentucky.

(c) That there is also involved Section 41, Title 28 of the United States Commerce Laws (U. S. C. A.) 8-23. There is also involved Sections 171, 172, 174, 181 and 182, and Sections 109, 3 and 19 of the Constitution of the State of Kentucky, which is attached, marked Exhibit C; and also Section 63 of the Civil Code of Practice of the State of Kentucky.

That the date of the final decree and judgment sought to be reviewed, is April 16, 1938, of three judges, and the date upon which this application for appeal was made and presented herein was on the same date, on which appeal was allowed by the three-judge court.

(d) That the nature of the above entitled case was an application for an injunction by the appellants against J. W. Martin, Revenue Agent of the State of Kentucky, and the State of Kentucky *et al.*, to restrain said State officials from enforcing the tax Act and other provisions of the laws hereinbefore referred to, and restrain said officials from seizing certain alcoholic beverages, owned by petitioner's licensee, Central Distributing Company, Inc., on which appellants held a mortgage for more than $3,000, and to prevent revoking their licensee's permit which would have destroyed their licensee's business and their security.

(e) That appellees on or about the 15th day of January, 1938, seized by attachment process approximately $5,000 of merchandise on which your appellants held a first lien mortgage under the laws of Kentucky.

That the amount in controversy is approximately $4,500, claimed in taxes by the State of Kentucky, and about $3,500 due to these appellants, and about twenty-one thousand dollars overpaid in taxes by your appellant's licensee, Central Distributing Company, which claim is assigned to these appellants, and therefore the amount in controversy is, exclusive of interest and costs three thousand dollars and over. The said appellants at all times being citizens of Ohio and the appellees, citizens and corporation of Kentucky.

That said Alcoholic Act of Kentucky of 1934 is void, and the tax provision of the Act of 1936 is repugnant to the Constitution of the State of Kentucky, Sections 171, 172, 174, 181, 182 and the import provision for import tax of five cents per gallon on whiskey under the Act of 1936, is a violation of Section 8 of Article One of the Constitution of the United States; and the said Act of 1934 under which charges were made against appellants' licensee for nonpayment of said taxes is repealed, and the Act of March 7, 1938, enacted after the said suit was brought against Central Distributing Company and the said appellees are seeking to give that Act *ex post* and retroactive force, contrary to Section 19 of the Constitution of Kentucky and the decisions of its courts.

As to the jurisdiction of the Franklin Circuit Court, the following sections of the Statutes of Kentucky, its Code of Practice and the decisions thereunder, your appellants believe, sustain the grounds which will support the jurisdiction of this Court.

Sec. 63, Carroll's Code of Practice of Kentucky;
Section 976 of the Compiled laws of Kentucky;
Section 59, 126, 19, 109 and 3 of the Constitution of Kentucky;
James v. *Helm*, 129 Kentucky 239;

Commonwealth v. *Grand Central Building and Loan*, 30 S. W., at page 628;
Commonwealth v. *Long*, 30 S. W., page 629;
Sections 171, 172, 174, 181, 182 of the Constitution of Kentucky.

As to the jurisdiction of this Court we think the following decisions sustain appellants contention:

Claybrook v. *City of Owensboro*, 16 Fed. 297;
Ward v. *Flood*, 48 California 51;
Corson v. *Maryland*, 120 U. S. 489;
Asher v. *Texas*, 128 U. S. 129;
Ex parte Virginia, 100 U. S. 339;
Shepherd v. *Johnson*, 2 Humphrey 285;
Ex parte Young, 209 U. S. 123;
In re Rahrer, 140 U. S. 545;
Scott v. *Donald*, 165 U. S. 58;
Walling v. *Michigan*, 116 U. S. 446;
J. and A. Frieberg v. *Dawson*, 274 Fed. 255;
Dawson v. *Kentucky Distilleries*, 255 U. S. 288;
Field Packing Co. v. *Glenn*, 5 Fed. Supp. 4;
Fiscal Court of Owen County v. *Cox*, 132 Kentucky 738;
Sperry and Hutchinson v. *Owensboro*, 151 Kentucky 389;
Oklahoma Gas and Electric Company v. *Oklahoma Packing Co.*, 292 U. S. 386;
Reagan v. *Farmers Loan and Trust Company*, 154 U. S. 362;
City of Louisville v. *Pooley*, 136 Kentucky 286;
Metcalfe v. *Watertown*, 128 U. S. 586;
Stewart Dry Goods Company v. *Lewis*, 7 Fed. Supp. 438;
Salisbury v. *Equitable Purchasing Company*, 177 Kentucky 248;
Moore v. *State Board of Charities*, 239 Kentucky 729;

Martin v. *Norcero*, 269 Kentucky 159;
Speckert v. *City of Louisville*, 79 Kentucky 325;
Cowley v. *Railroad Company*, 159 U. S. 569;
Union Pacific Railroad v. *Board of Equalization*, 247 U. S. 282;
Cross Lake Country Club v. *La.*, 224 U. S. 632;
Standard Oil Co. of Kentucky v. *Commonwealth*, 119 Kentucky 75;
Brady v. *Bannon*, 134 Kentucky 769;
Hagar v. *Walker*, 128 Kentucky 128;
Gates v. *Barrett*, 79 Kentucky 296;
Shinkle v. *City of Covington*, 129 Kentucky 368;
Lemke v. *Farmers Loan and Grain Company*, 255 U. S., page 56;
Smythe v. *Ames*, 169 U. S. 466;
Coe v. *Errol*, 116 U. S. 517;
Baldwin v. *Selig Co.*, 294 U. S. 516;
Sherman v. *Grinnell*, 123 U. S. 679;
McCormick v. *Brown*, 286 U. S. 131;
Dugan v. *Bridges*, 16 Supp. 634;
Pacific Produce Company v. *Martin*, 16 Fed. Supp. 34;
Rhodes v. *Iowa*, 170 U. S. 412

A copy of the judgment of the three-judge court is set forth as Exhibit F.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of the Section 380, Title 28 of the U. S. Code, annotated, and Section 266 of the Judicial Code as Amended, and the Constitution of the United States, Article 3, Section 2, thereof.

Respectfully submitted,

HARVEY H. SMITH,
WILLIAM A. SCHUBERTH,
HENRY J. COOK,
Counsel for Appellants

EXHIBIT "A".

Carroll's Kentucky Codes.

SEC. 63. *Fine or forfeiture to recover; officer against.*—Actions must be brought in the county where the cause of action, or some part thereof, arose.—

1. *Fine, penalty, or forfeiture to recover.*—For the recovery of a fine, penalty, or forfeiture, imposed by a statute; but if the offense for which the claim is made be committed on a water-course or road which is the boundary of two counties, the action may be brought in either of them.

2. *Public officer; against.*—Against a public officer for an act done by him in virtue or under color of his office, or for a neglect of duty.

3. *Action on official bond.*—Upon the official bond of a public officer.

EXHIBIT "B".

Carroll's Kentucky Statutes.

SEC. 976. *Franklin circuit court; jurisdiction in Commonwealth cases.*—The Franklin circuit shall have jurisdiction, in behalf of the Commonwealth, of all causes, suits and motions against clerks of courts, collectors of public money, and all public debtors or defaulters, and others claiming under them; and for this purpose its jurisdiction shall be co-extensive with the state.

EXHIBIT "C".

Constitution of Kentucky.

SEC. 171. *Levy and collection of taxes by general laws; public purposes only; uniform within the class and terri-*

tory; classification of property; bonds of state and its divisions exempt; referendum of laws classifying property; provisions for.—The general assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

The general assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation. Bonds of the state and of counties, municipalities, taxing and school districts shall not be subject to taxation.

Any law passed or enacted by the general assembly pursuant to the provisions of or under this amendment or amended section of the constitution, classifying property and providing a lower rate of taxation on personal property, tangible or intangible, than upon real estate, shall be subject to the referendum power of the people, which is hereby declared to exist to apply only to this section, or amended section. The referendum may be demanded by the people against one or more items, sections or parts of any act enacted pursuant to or under the power granted by this amendment, or amended section. The referendum petition shall be filed with the secretary of state not more than four months after the final adjournment of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the governor shall not extend to measures referred to the people under this section. All elections on measures referred to the people under this act shall be at the regular general election, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become a law when approved by the majority of the votes cast thereon, and not otherwise. The whole number of votes cast for the candidates for governor at the regular election last preceding the filing of any petition shall be the basis upon which the legal voters necessary to sign such petition

shall be counted. The power of the referendum shall be ordered by the legislative assembly at any time any acts or bills are enacted, pursuant to the power granted under this section or amended section, prior to the year of one thousand nine hundred and seventeen. After that time, the power of the referendum may be ordered either by the petition signed by five per cent (5%) of the legal voters or by the legislative assembly at the time said acts or bills are enacted. The general assembly enacting the bill shall provide a way by which the act shall be submitted to the people. The filing of a referendum petition against one or more items, sections or parts of an act shall not delay the remainder of that act from becoming operative. (Amended November, 1915.)

EXHIBIT "D".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

J. W. KOHN, M. S. KOHN, and J. W. KOHN, Administrator of the Estate of Carrie Kohn, *Petitioners*,

v.

CENTRAL DISTRIBUTING COMPANY, INC., 45 E. 11th Street, Newport, Kentucky, and the COMMONWEALTH OF KENTUCKY, by and on the relation of James W. Martin, Commissioner of Revenue, and L. C. Sickmier, Sheriff of Campbell County, Kentucky.

Order and Judgment of the Court.

This cause coming on for hearing before the Honorables Elwood Hamilton, United States Circuit Judge, John D. Martin, United States District Judge, and Mac Swinford, United States District Judge, on the motion of the petitioners for a temporary and permanent injunction, and the petitioners being present by counsel H. H. Smith and Henry Cook, and respondents being present by counsel J. J. Leary and William Hayes, Assistant Attorney General for the

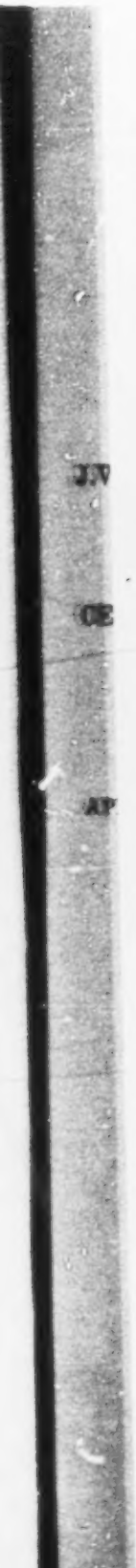
Commonwealth of Kentucky; and the Court being fully advised, it is ordered, adjudged and decreed that the temporary and permanent injunction of petitioners be denied, and the motion of petitioners for said injunction be and is hereby over-ruled; and the petitions of the petitioners are dismissed, to all of which petitioners object and except.

It being the opinion of the court that the legislative act of 1934, entitled "Kentucky Alcohol Control Act", furnishes petitioners an adequate remedy in Section Twelve (12) of said Act to contest the validity of said Act and to recover any taxes collected from them by the State of Kentucky under said Act.

Petitioners, by their counsel, announced that they wished to appeal to the Supreme Court of the United States from the judgment, order and decree of this Court, and give notice in open court to that effect; which appeal is now granted and allowed by the Court.

Enter: This 16th day of April, 1938.

ELWOOD HAMILTON,
United States Circuit Judge.
JOHN D. MARTIN,
United States District Judge.
MAC SWINFORD,
United States District Judge.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1938

No. 177

J.W. KOHN, M. S. KOHN and J.W. KOHN, Administrators of the Estate of Carrie Kohn, Deceased,

Appellants.

vs.

CENTRAL DISTRIBUTING COMPANY, INC., and THE COMMONWEALTH OF KENTUCKY, ETC., et al,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Filed July 5th, 1938

(The letters TR refer to the Transcript of Record)

BRIEF FOR APPELLANTS

HARVEY H. SMITH, Attorney,
SMITH & SCHUBERTH, Counsel,
WILLIAM A. SCHUBERTH, Counsel.
Counsel for Appellants.

REFERENCE INDEX

The Appellants assail the Constitutionality of the Act, "Kentucky Alcohol Control Act", effective March 7th, 1934.

Appellants assail the Constitutionality of the Whiskey Tax Law, effective April 9th, 1936.

These Acts are assailed under the authority of section 266 of the U. S. Compiled Laws.

These sections which impose the tax are found in the Kentucky Statutes (Carroll's) in the following sections:

Page 2259,

Section 4281c-4 (providing for the $1.04 per gallon tax.)
Section 4281c-6 (import taxes.)
Section 4281c-5 (providing that the wholesaler pay the tax.)
4105 and 4106 provide for assessment and valuation.
4214a-13 the manufacturers tax.
4265 provides the Commonwealth is not liable for costs.
4214d-10 provide for sworn assessment.
4214a-16 a provision concerning imports.
4214a-17 also refers to imports.

The enforcement of said Acts constitute official oppression of Appellants by officials of Kentucky in violation of the 14th Amendment to the Constitution of the United States, and the equal protection laws clause of the United States.

These statutes are not printed in this brief nor in the Appendix but the sections assailed are quoted herein: the entire Acts may be found in the Record in full—the Green Book, 1934 Act and the Blue Book, the 1936 Act. Also Amendment 7 of the Constitution of the State of Kentucky is quoted, relied upon as voiding both of these Acts

Assignment of Errors is printed in full in the statement of Jurisdiction. (Included in POINTS argued).

The Act of April 7, 1938—House Bill 129, designated as Kentucky State Alcoholic Beverage Control Law, section 122, repeals Chapter, 146, Acts of the General Assembly of 1934, which repeal section is printed in the Appendix, showing that the 1934 Act in so far as pertinent here is repealed.

Statement of jurisdiction need not be repeated here, and may be found on the printed statement on jurisdiction.

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Judicial Code, Sec 266.
Feb. 13, 1925, C. 229, Sec. 143.
Statutes 938, (28 U. S. C. A. 380).
Sec. 380, Title 28 of U. S. Code.
Annotated.
Sec. 14, Judicial Code U. S. C. A. — Sec. 41, Sub. 13.
Sec. 266 Judicial Code as Amended by Act of 1925.
Sec. 28 to 39 of the Judicial Code.
28 U. S. C. A., sections 71-82.
Judicial Code (Act of March 3, 1911, Chap. 231).
Art. 1, Sec. 8 Constitution U. S. and Carmack Amendment.
Art. 1, Sec. 2 and Article 3, Sec. 2, 14th Amendment Constitution of the U. S.

STATUTES CITED: (State) of Kentucky.

Kentucky Control Act 1934
Kentucky Tax Act 1936
Kentucky Control Act 1938. See Kentucky Statutes—1937.
Constitution of Kentucky, Sections 171, 172, 174, 181.
59, sub. 29, Bill of Rights, 3 and 10, 26, 27. Amendment 7, Section 175 Prohibiting extension of exemptions in taxes, 51, 135, 109, 19, 125, 126, 182, 28, 155.
Applicab'e Statutes: (Kentucky)
(Carroll's Statutes) Sec. 2306-2307.
976, Section 4260c, 4261, 4022, 3670 sub 10.
4028, 4029, 2524, 72, Act of 1906, Chap. 22.
Carroll's Code
63, 72, Criminal Code sec. 11.
118, 70, 71, 73, 75, 66, 732, 52 (72 and 63 are jurisdiction provisions) 379, 380, 732, 738. See, Transcript of Record. printed.)
See Transcript of Record (not printed) for Act 1934-1936 (not printed) and Assignment of Errors (printed T. R.)
Carmack Amendment Act, June 29, 1906 Stat. 34, 593.
Assignment of Errors from 1 to 11 include all of the points argued, and are not specifically referred to for that reason.

I

FEDERAL AND STATE CITATIONS

A.
Alabama R. R. Co. vs. American Cotton Oil Co., 229 Fed. 11, 18.
Asher vs. State of Texas, 100 U. S., 339; 128 U. S. 129.
Arkansas & Louisiana Pipe Line Co. vs. Coverdale, 20 Supp., 676.

B.
Brady vs. Bannon, 134 Ky., 769.
Baldwin vs. Seelig, 294 U. S., 516.
Board of Penn. Com. vs. Spencer, 159 Ky., 255.
Bushaber vs. Union Pac. R. R., 240 U. S., 1 to 5.
Bradshaw vs. Bowden, 226 Federal, 327.

C.
Cumberland Tel. Co. vs. Hopkins, 121 Ky., 850.
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Clark Distilling Co. vs. Western Maryland Ry. Co., 242 U. S., 311.
Commonwealth vs. Long, 30 S. W., 629 (Court of Appeals of Ky.)
Commonwealth vs. Grand Central Bldg. & Loan Ass'n, 30 S. W., 628 (Court of Appeals of Ky.)
Cooley Vol. 1, 394.
Commonwealth vs. Kinnaird, 18 Ky. Reporter, 647.
Cogar vs. Wright, 78 Ky., 59.
Claybrook vs. City of Owensboro, 16 Fed., 297.
Commonwealth vs. Louisville Gas Co., 122 U. S. S. W., 164.
Casey vs. Newport Mill Co., 156 Ky., 623.
Craig vs. Renaker, 201 Ky., 582
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Cavanaugh vs. Looney, 248 U. S., 453.
Cowley vs. Railroad, 159 U. S., 569.
Carson vs. Petroleum Co., 249 U. S., 95.
Crutcher vs. Kentucky, 141 U. S., 47.
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City of Knoxville vs. Southern Com. Co., 220 Fed., 236.
Cumberland Tel. Co. vs. Hopkins, 121 Ky., 850.
Commonwealth vs. So. Pac. Co., 150 Ky., 97.
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C. & O. Ry. Co. vs. Gibson Co., 25 Federal (2nd) 215.
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Campbell Co. vs. City Newport, 174 Ky., 712.
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D.
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E.
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F.
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G.
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H.
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J.
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K.
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L.
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L. & N. R. R. Co. vs. Greenbrier Dist'g. Co., 170 Ky., 775.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 177

J.W. KOHN, M. S. KOHN and J.W. KOHN, Administrators of the Estate of Carrie Kohn, Deceased,

Appellants,

vs.

CENTRAL DISTRIBUTING COMPANY, INC., and THE COMMONWEALTH OF KENTUCKY, ETC., et al,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Filed July 5th, 1938

(The letters TR refer to the Transcript of Record)

BRIEF FOR APPELLANTS

May It Please The Court:

STATEMENT:

To the Honorable Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

The three-judge court of the district court of the United States for the Eastern District of Kentucky, sustained appel-

lee's motion to dismiss appellants amended bill in equity for injunctive relief, and this is the immediate issue before this court although we discuss other questions which we think form a relative basis of this complaint.

Involved in this controversy are three acts of the Kentucky Legislature. Kentucky Alcohol Control Act, enacted by the General Assembly of Kentucky and effective March 17, 1934; and the Kentucky Alcoholic Beverage Tax Law, effective April 30, 1936; and the Kentucky State Alcoholic Beverage Control Act, enacted March 7, 1938. The constitutionality of these Acts constitute, with the oppression of state officers the basis of the equity action for injunctive relief.

We raise, and argue the questions in the order they appear to us, with the question in each issue, and quote, "is there an adequate remedy at law; and was there an issue presented of jurisdiction to the three-judge court, and did the amended bill of Appellants state a cause of action to said court, and was it the duty of said court to consider all of the issues made by said court on the record, or did said court commit error in dismissing said bill on the grounds alone, that the Appellant had an adequate remedy by suit to collect taxes due or not due, to the Appellants which had been paid by its mortgagor, the Central Distributing Company, to the Commonwealth of Kentucky?

Brief Statement of Fact

The Central Distributing Company is a Kentucky corporation, at all times engaged in the wholesale distribution of liquor, licensed under the Act of the Legislature of 1934 which Act was passed by the Legislature of Kentucky immediately after the repeal of the 18th Amendment but before the repeal of a similar amendment to the Constitution of Kentucky, Amendment 7. This amendment is section 226a as follows, found at page 19 and 12 af the transcript of the record, and the important part reading: "The manufacture, sale, transportation of spirituous, vinous, malt or other intoxication liquors, — is hereby prohibited.

The Appellants held a chattel mortgage on cases of whiskey and the equipment and furniture of the Central Distributing Company, then a licensee under the 1934 Act of the Legislature of Kentucky and before the repeal of the 7th Amendment of the Kentucky Constitution, which Act the Central Distributing Company, perhaps, may not complain of, but which these Appellants, mortgagees may. This mortgage indebtedness, at said time was overdue and amounted to approximately thirty-one hundred ($3100) dollars and over as alleged in appellants petitions, paragraph 3 page 4, (TR).

A supplemental license tax was attempted to be passed in 1936, levying a tax of $1.04 per gallon on all whiskey sold in the state, and a 5 cent per gallon tax, levied on imported whiskey, per gallon. The plan, in order to evade the Constitution, was to require the importer to purchase import privilege stamps, the state called them.

On February 16th, 1938, the state, issued an attachment out of the Franklin Circuit Court of Kentucky, which was not the place of business of Central Distributing Company nor the place or residence of its service agent, both being in Campbell County, Kentucky: Appellee, Central Distributing Company, claiming no such suit or incidental attachment could be brought there under the Constitution and laws of Kentucky, against it. Section 72, Carrolls Code of Kentucky, controlling jurisdiction of said suit.

They seized the business, and all assets of Central Distributing Company, locked its place of business, and later removed the merchandise of the corporation, all of which happened while the Appellants were in process of foreclosing their mortgage, duly recorded before the suit was brought or attachment issued.

The attachment was served on no officer of the Company or on the service agent of it, but on the Manager of these Appellants, Harry Bayer, paragraph 4 page 5, (TR). All of the furniture and equipment in a few days were removed from the building where located.

Thereupon the appellants on April 11, 1938, filed their amended petition, and prior thereto it had filed its original petition and made service thereon.

They asked the Eastern District Court for a temporary and permanent injunction, and moved for reference to the three-judge court, which motion was denied, and then appellants appealed to the Circuit Court of Appeals for the 6th Circuit, for a reversal of this order, pending which, by agreement of the appellants to dismiss said application, the district court reversed the previous judgment, and the cause stood for hearing on its order before the three-judge court on the issue of injunctive relief. Prior, however, the appellants made their motion for a judgment on their amended petition, April 11, 1938, the date of the filing of their original petition being February 28, 1938. Service was acknowledged by appellees attorneys of brief after service of the summons which service was on the 25th day of February, and thereupon the court ordered the filing of said motion for judgment (TR) page 16.

The motion for judgment was made on April 11, 1938 (TR) page 27. The motion so made was for judgment as by confession and default, and on this motion appellants introduced evidence by affidavits (Page 20 TR), inclusive, and to and including of page 27 (TR). The appellees offered no evidence and made no answer, until the cause was moved to the three-judge court, and on the 16th of April, they filed their motion to dismiss, pending the argument, the district court having denied appellants motion for a judgment on the amended petition—exceptions taken.

The motion carried with it a confession of the issue of jurisdiction, and the facts alleged in the petition, so that when the three-judge court assembled, they had but one question to decide, that of jurisdiction, and the jurisdiction of the district court; but the three-judge court sustained appellees motion to dismiss on the ground that no right was shown for injunctive relief and that the appellants had an adequate remedy under section 12 of the act of 1934 which appellants claim was a void statute altogether, and had been repealed, that the Legislature of Kentucky under the

7th Amendment to the Constitution of Kentucky, above cited, had no authority to enact a beverage statute.

In the meantime the Alcohol Beverage Board had cited the Central Distributing Company to appear before the appellees, J. W. Martin, and the said board, to hear if its license, under the Act of 1934 should not or should be revoked. It had such hearing and did revoke said license, disregarding all of the defenses made by the licensee. The Act of 1934, the terms of which it enforced had been repealed, which repeal they held as immaterial, but appellants contended that the said Hageman who acted under it, page 24 (TR), had been legislated out of office. The Board thereupon attempted on April 5th, 1938, after the enactment of March 7th, 1938 Law hereinbefore designated, and which became effective after the repeal of the Amendment 7 of the Kentucky Constitution, to rehash the charges made by Hageman under the new Act of March 7th, 1938, (TR page 26) known as the Kentucky State Alcohol Beverage Control Act. The April 16th motion filed by appellees was sustained on the date of its filing, and an order made on said date dismissing appellants petition, and an order allowing appeal: Appellants on the same day filed their Assignment of Errors, page 30 (TR), served it on the executive officers of the state with notice.

Rule 8, subdivision D, of the Act of June 19, 1934, may not be controlling of this action, but it is in substance the same as the law at the time of the filing of this action in the United States District Court under the law then existing averments undenied are admitted, section 114 of Carrolls; Kentucky Code provides, that parties must move before trial, for a material issue concerning each cause of controversy; and it is the duty of the court upon or without motion, to compel them to do so; and, for that purpose, they may be required to reform their pleadings or the pleading of a party who is in fault may be stricken from the case. At section 110, inclusive of section 139, govern the practice and pleading in such case and the demurrer or motion or answer may be filed in any case. If no answer or pleading is filed in 20 days, then such party is in default, section 142.

(10 days after summons in the county) section 3670-10, Carrolls Code (Fed Rule 12).

The appellees therefore, under the state practice and under the federal practice were in default when appellants filed their motion for judgment. It is true that the court had the discretion to extend the time, but was not asked to do so. The motion for judgment should have been sustained. Section 379-380 Kentucky Codes. Rules 12 and 65,-U. S.

Therefore, there was nothing before the three-judge court except the question, "does the petition of the appellants state a cause of action, for jurisdiction?"

This petition was undenied by appellee but assuming the court might examine that question, on their own motion, there was no ground for dismissal and the court did not base their order of dismissal on any other ground alleged in appellants petition, except that the appellants had an adequate remedy by law to collect illegal tax. They found the court had jurisdiction by assuming dismissal, but that the appellants had a remedy for recovery by suit for taxes paid. This ruling also applied to the Central Distributing Company had it been a plaintiff, but it was not asking for relief, being an uninterested defendant, and a nominal party to the litigation.

General Argument

The petition showed clearly, that between the defendants, they had the property which did secure the appellants note and this was admitted. The record did show at that time that there was no pleading filed by appellees in the Eastern District Court of Kentucky when the cause was submitted to the three-judge court and we think that no order of dismissal of this court could be entertained. It might refer the case back to the district court with an order that no constitutional questions were involved, but it could not make an order on the merits of the cause, or permit any pleading to be filed before them, deciding the case on the record as they found it. They narrowed their decision to one question—remedy to collect tax.

It is clear from the facts that the Franklin Circuit Court where the appellees had appeared, had no jurisdiction to sustain the attachment as there was not a single denial of record to this allegation. The petition alleged that the appellees had over nine thousand dollars of tax money collected from the mortgagor for importation of liquors to Kentucky which, under the laws of Kentucky, was the property of these appellants. So in any event, being residents of Ohio, and the defandants, both being citizens of Kentucky, and it being admitted that more than three thousand dollars was involved in the litigation, there was but one order the court could make, send the case back to the district court for trial, if the pleadings had been denied, there to determine the issues, and allow the district judge to make up the issues, or enter judgment themselves on the undenied equity issues. They may or may not have had this power and certainly the district court had no less power, over the objection of the appellants, and properly should have received the case and ordered the common-law issues to a jury.

But it is our opinion, without discussing any questions arising under the petition affecting laws which control the action and under the Constitution of the United States that there was no issue left, as a matter of fact, only to determining the amount of appellants recovery, at common law, which of course depended upon proof before a jury, inasmuch as a jury trial had not been waived.

There also was the mortgage lien, in the amount due thereunder, the amount of import taxes, which appellants under the issues had due to them and the amount of unlawful consumers tax which were taken away from their mortgagor. Then there was the further question as to whether the revenue commissioner had authority to seize property, and all other questions of fact that stood for debate, the questions of law being admitted by the default in pleading.

The ground upon which the court dismissed the action was no legal ground of dismissal insofar as issues were concerned arising under the laws of Kentucky, and there

was no other issue arising except under Article I section 8 of the Constitution of the United States.

By the stretch of the imagination only could injunctive relief be denied on the face of the record.

Statutatory Right vs. Order of Dismissal

The 14th section of the judicial Code provides for original jurisdiction in such cases; 28 U. S. C. A. section 41. (13).

> "Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under the color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or by any right secured by any law of the United States, providing for equal rights of the citizens of the United States, or of all persons within the jurisdiction of the United States."

This clause refers to personal rights as well as property rights, and therefore the right of the appellants to foreclose their mortgage for a money loan to a citizen, corporation of Kentucky, is involving a law of the United States and the construction of which may dispose of the case. The right to sue in a federal court where the amount and diversity exists is another right of a citizen of the United States, which cannot be disposed of without a determination of the issues, and cannot be disposed of by an order of dismissal.

Where a court takes control of the property of a foreign citizen and seeks to confiscate it, the property right is secured by federal law and the Constitution of the United States; and this situation presents a complete issue of due process. Where a court or other state official seized property of a foreign citizen with no jurisdictional right, or acts under an invalid law, or a law that has been repealed, a right under the United States Constitution has been presented.

We have already cited a full line of authorities on the question of the jurisdiction of this court in the statement on jurisdiction, and these authorities will be omitted.

In Carrolls Code of Kentucky section 379-80, it is provided that judgment may be entered on the pleadings when the allegations are undenied and where every fact pleaded stands admitted, if a cause of action in law is pleaded. In other words, if a judgment on an undenied petition can be rendered it may not be set aside, except for causes enumerated of unavoidable casualty.

We conclude, and it is apparent, that the recovery of the taxes was only one of the issues in the case, but even on that issue, made by the amended petition, if the three-judge court took a proper view, they could not sustain a motion for dismissal, on the question of taxes alone, or on any or all of the questions, unless therefore we assume they have such general authority as to determine questions of law and fact.

Argument 1, Point 13

Point 13, is suggested for support of this argument. It was set-up as a ground, that the import taxes owing to the mortgagor, and assigned to these appellants, amounted to more than the taxes claimed by appellees, and in point 7 we have alleged that these taxes were collected in violation of section 8, Article I, of the Constitution of the United States; and the amount of nine thousand dollars was therefore, an admitted amount under the state of the pleading. The allegation is, "having in its possession in excess of nine thousand dollars of money".

In point 8 at page 38 (TR), appellants again raised the same question, that these taxes were due the mortgagor on which appellants had a mortgage as this money in part was produced from the mortgage property and the business.

This import tax is concededly illegal, as set out in point 11 at page 38 (TR) where appellants show by the language of the Court of Appeals, and where the issue was presented, that, "injunction to prevent collection of an illegal tax is

the only adequate remedy." This decision, as Kentucky law, was binding on the three-judge court when the question of the legality of these taxes was raised. If these taxes were illegal, as the records show, by admission of Appellees, then on this issue, appellants were entitled to judgment.

Now whiskey is defined as property by the statutes of Kentucky, section 4022, (Carrolls).

And in Brady vs. Bannon 134 Kentucky, page 769, same question was determined favorable to this contention.

This question was therefore an issue before the court, as was also the consumers taxes due, set out in point 14, on which ground the court apparently decided to sustain a dismissal of appellants petition. The three-judge court could not segregate any issue, and ignore others, and especially where the other questions were of equal importance. If the motion for dismissal is to have the force and effect of a demurrer the petition must be sustained, for a cause of action, and we therefore see the error of the court in singling out one issue.

The fact, as shown by the state of the record, that the appellees were trying to destroy the business of the licensee, on the specious ground of an illegal tax, made it necessary for the three-judge court to determine whether the tax was legal or illegal. If it was illegal then there was clear evidence that the injunction must issue. At page 24 (TR), and also at page 26, there is ample proof that both administrators intended actually to destroy the business of the corporation.

There, it is plain, that a charge against the licensee was to be used as the grounds of revocation that foreign citizens who, come, we may assume were licensed to do business, from a wet or monopoly state, were required to disclose their destination. even though it is admitted they were not selling liquor in Kentucky; and this was done in spite of the fact known to the appellees that they were burdening interstate commerce. No valid taxes could be collected on such transactions. This shows the state's intention to op-

press the business because the attachment had already been levied and no summons had been served on the corporation.

See section 3, of the charges at page 26 (TR).

Section 4, of the same charges showed conclusively that the mortgagor or corporation was to be prosecuted by a state officer for the non-purchase of stamps via the rule of a valid import tax license—a clear burden on commerce between the states. Therefore there was no adequate remedy by suit to collect taxes to prevent this arbitrary abuse of power. This allegation was admitted under the state of the Pleadings.

Under no circumstances could the right of injunction be overlooked where the basis of invoking it was the demand for the payment of illegal tax. This is the federal law and the universal decisions made by the court of Appeals of Kentucky.

Argument 2, Point 2

The Franklin Circuit Court issuing an attachment, was without jurisdiction of the subject matter, and the attaching order of that court took appellants property without due process, and section 266, Judicial Code, provides for injunctive relief in such cases by the federal court, and such relief is based on the denial of due process under the 14th amendment to the Constitution of the United States by exercise of power under illegal statute.

Section 72 of the Code of Civil Practice of Kentucky provides specifically for the jurisdiction of the Circuit Courts of Kentucky in corporation cases to be at the place of business of the corporation or in the county where the service agent resides which in this case was Campbell County, the place of both, and not in Franklin County.

The Act of 1936 and the Act of March 7, 1938, provide for a fine and imprisonment for the offense charged by the Alcohol Board and the Revenue agent Hageman. This charge is for selling liquor in Kentucky when tax stamps were not attached. Either fine or imprisonment might be

imposed. The offense was not in the refusal to pay the tax but in selling the liquor in Campbell County where the offense was committed. Therefore the Act out of which the offense grew, and on which the attachment was based, occurred in Campbell County, and the suit would have to come under the terms of Section 72 of the Civil Code of Practice (Carrolls) "Excepting the actions mentioned in sections 62 and 66, both inclusive, and in sections 68, 70, 71, 73, 75, and 77, an action against a corporation which has an office or place of business in this State, or a chief officer or agent residing in this State, must be brought in the county in which such office or place of business is situated, or in which such officer or agent resides; or if it be upon a contract, in the above-named county, or in the county in which the contract is made or to be performed; or, if it be for a tort, in the first-named county, or the county in which the tort is committed . . . (Who is "chief officer," section 732. Meaning of "resides," section 732. Service of Summons on, section 52)" (Carroll s Code).

The meaning of residence is defined in section 732 as the office of the place of business, and chief officer is defined as the chief officer or agent of the corporation, first, its President; second, its Vice-President; third, its Secretary or Librarian; fourth, its Cashier or Treasurer; fifth, its Clerk; sixth, its Managing Agent. The service of summons or attachment order was not served on either. This under the decisions in Kentucky, was a ground of injunctive relief, and this is admitted on the record before the three-judge court, as the pleading stood.

This above section, fixes the venue of the action, but if it did not exist, the place of the suit was in Campbell County by virtue of section 63 of the Code of Practice, Exhibit A, page 1 (TR).

We quote: "Actions must be brought in the county where the cause of action comes or some part thereof arose—Fine penalty, or forfeiture of recovery—For the recovery of a fine, penalty or forfeiture, imposed by statute and so forth."

This lack of jurisdiction occurred to the three-judge court on the reading of appellants amended petition.

Now the statute which it is alleged gave super-jurisdiction to the Franklin Circuit Court is 976 Carrolls Statutes (Exhibit B) page 1 (TR).

We quote: "Against Clerks of courts, collectors of public money, and all public debtors and defaulters, and others claiming under them.."

The Central Distributing Company was not a **public** dedefaulter, because it held no public office, but it is a private debtor, if anything, and not a public debtor. The word **"public"** refers to a public agency of the state, as it was the aim of the statute to give jurisdiction in this class of cases to the Franklin Circuit Court to enforce public obligations to the state by public officials.

This is proven by section 11 of the Criminal Code of Procedure (Carrolls), which says "That actions for penalties, may be brought as a civil action", but this section does not abrogate the Code provisions where offenses are committed the penalties must be enforced there, as provided under section 63, because some part of the action arose where the offense was committed.

Both sections 72 and 63 are jurisdictional statutes, fixing the place where suits must be brought, and the record shows that the Central Distributing Company had its place of business in Campbell County, and if it sold liquors without stamps to local buyers, for use and delivery in Kentucky then the Circuit Court in Campbell County alone had jurisdiction. The officer served, as alleged in the petition, was not an officer of the company.

The decisions: (Kentucky Court of Appeals and Federal), James vs. Helm, Auditor, 129 Kentucky, page 239.

"Not only has our court held that a prosecution for enforcement of a penalty for violation of a statute where imprisonment is imposed is not a civil action but other jurisdictions as well as here, have, with a degree of uniformity, held the same."

In Commonwealth vs. Long, 30 S. W. 629 (Court of Appeals of Kentucky) said: "Jurisdiction could not be maintained in Franklin Circuit Court where penalties were sought to be enforced, just decided by this court".

In the case of Commonwealth vs. Grand Central Building and Loan Association, 30 S. W., page 628, it is said that an action to collect penalties is without the jurisdiction of the Franklin Circuit Court.

The same pronouncement was made by the Supreme Court of the United States in No. 15,043, where it is held that an imprisonment statute must be enforced where the offense took place, and such is the general holding of the Court of Appeals in the following cases:

Morrell vs. Commonwealth, 129 Kentucky, 740;
L and N Railroad Company vs. Commonwealth, 104 Kentucky Reporter, 735;
McBride vs. Commonwealth, 4 Bush, 331;
Commonwealth vs. Kinnaird, 18 Kentucky Reporter, 647;
Terry vs. Commonwealth, 104 Kentucky, 726;
House vs. Bank of Lewisport Bank, 198 S. W. 762 (Kentucky case).

The petition of the plaintiff must show that the county where the action was brought is within the provisions of the Code of Practice, otherwise Jurisdiction may be raised by an answer, as provided in section 118 of the Code of Civil Practice (Carrolls):

Pennacle vs. Simpson, 216 Kentucky 187;
Rice vs. Kelly, 226 Kentucky 346.

There was no Summons served on an officer of the company and the order of attachment was not served on any officer of the company, and therefore no petition was filed before or at the commencement of the attachment.

The filing of a petition and a service of Summons is the commencement of an action, and an attachment cannot be

filed until an action has begun, and these requirements cannot be waived.

Duncan vs. Griswold, 92 Kentucky 546.

If the writ of attachment is procured without grounds or jurisdiction it will be discharged before judgment.

First National Bank vs. Sanders Bros., 162 Kentucky 374;
Peters vs. Conway, 4th Bush 565;
Hall vs. Grogan, 78 Kentucky page 11;
Keller vs. Stanley, 86 Kentucky page 240;
Redwine vs. Underwood, 101 Kentucky page 190.

Thus there was no jurisdiction in the Franklin Circuit Court, issuing the attachment, no service of a Summons or legal attachment, and no proper hearing to assess the taxes by any statutory authorized agency, hence the property was seized by the Sheriff of Campbell County and the appellees without legal right or authority; and in such case injunction is the proper remedy, and such seizure was made in violation of the 14th amendment.

A petition filed must affirmatively show, where remedy is sought. to be enforced, that it is done in the manner prescribed by law, or there is not due process.

Shawhan vs. Zinn, Kentucky Opinions June 1881;
Cogar vs. Wright, 78 Kentucky 59;
McAllister vs. Savings Bank, 80 Kentucky 685;

Section 266 of the Judicial Code as Amended by Act of 1925;

Sections 28 to 39 of the Judicial Code 28 USCA—sections 71 to 82;

Home Telephone Company vs. City of Los Angeles, 227 US—page 278;
Ross vs. State of Oregon, 227 U. S. 150;
J. and A. Frieberg, 255 U. S. 288;
Claybrook vs. City of Owensboro, 16 Fed. 297;
Ward vs. Floor, 48 California page 51;

ExParte Young, 208 U. S. 123;
Frieberg vs. Dawson, 274 Federal 255.

The exercise of unlawful jurisdiction is a denial of due process and the party proceeded against is entitled to Federal protection.

Greene vs. L. and I. Railway Company, 244 U. S. 499;
Commonwealth vs. Louisville Gas Company, 122 U. S. S. W. 64;
Nichols vs. Coolidge, 274 U. S. 531;
Kennington vs. Palmer, 255 U. S. 100, 65 Law Edition 528.

The Statute of 1934, under which the seizure was made did not exist, because it had been held to be in substance, in previous litigation, a clear violation of Amendment 7, and the Court of Appeals of Kentucky had so held. See the decisions under point 24.

The exercise of such power violates the 14th amendment, and denies due process of law and the equal protection of the laws of Kentucky which are provided in the limitations of the Constitution of Kentucky against ex-post-facto legislation, and otherwise. Section 19, Kentucky Constitution.

Argument 3, Point 3

Judicial Code (Act of March 3, 1911, chapter 231, section 24, sub-section 1, 365 Statutes, 1091 Compiled Statutes, 1913, section 991,) gives the United States Court jurisdiction over a state officer who seeks to, and does burden interstate commerce, and presents a case arising under the laws of the United States.

If the Act of 1934 was invalid from the date of its passage it did not and could not provide a remedy by suit for anything. But we have here a valid mortgage, undenied as such, which was in the course of foreclosure by agreement, duly recorded and shown to be existing at page 16 (TR), and uncontested by either of the Appellees, and conceded by both, that the necessary diversity of citizenship existed.

Certainly a motion for judgment should have been sustained as to this claim, and an injunction should have issued, because the business and property seized denied to these appellants the right to pursue the collection of their debts to the end of the fiscal year, July 1938, if only three thousand dollars was secured.

It requires no citation of authority, only the Statutes on chattel mortgages to validate this mortgage, because it was in fact the property of appellants, and not that of the Central Distributing Company. Under an allegation of appellants petition, paragraph 3 of their amended petition and page 1 (TR), the question is raised by the assignment of error No. 10, and point 4 at page 37 (TR), and Carrolls Statutes 523a, 523b2, and 523b3 and 523b4, controlling chattel mortgages.

Seizure of these mortgage-assets and the liquor moving in commerce, (point 7, page 37 TR) was a violation of Article 1 section 8, of the Constitution of the United States, when appellees then had collected from the corporation nine thousand dollars in import taxes, for which appellants asked judgment in their petition against appellees, the Commonwealth of Kentucky having given its consent that action might be brought in any federal or state court to recover said illegal taxes, Act of 1934 and 1936.

Argument 4, Point 8

This point covers the import tax collection which Appellees possess and about which Central Distributing Company was cited on February 8 and April 5, 1938, under the Act of 1934, **repealed,** and the new Act of March 7, 1938.

The penalty statutes must be enforced by the Commonwealth's Attorney, who receives a certain portion of the fines and forfeitures in penal actions. The action must be brought in his district where the offense occurred, Campbell County, and could not be brought in Franklin County, where no part of the cause of action arose.

"Whocver proceeds against the property of another mu follow the provisions of the statute".

Pharis vs. Carver, 13 Ben Monroe (Kentucky) 236.

A cause of action is not pending unless a petition is file and a summons is served, filing and issuance good onl against Statute of limitations.

Section 2524 Carrolls Statutes;
Smith vs. Hunghey, 178 Kentucky, Page 702;
Casey vs. Newport Mill Co., 156 Kentucky, 623;
Paul vs. Smith, 82 Kentucky 451;
Moore vs. Shepherd I. Metcalfe, Page 97 (Kentucky)
Section 91 of Carroll's Code.
There can be no attachment unless a Summons served, and taking of property is denial of du process.
Hughes vs. Hardesty, 3 Bush, page 364;
Tinkham vs. Heyworth, 31 Ill., page 522.

Argument 5, Point 24

Whiskey is property in Kentucky as defined by statut Carrolls Statute, section 4022.

"For the purpose of taxation, real estate shall include a lands within this state and improvements thereon; an **personal estate** shall include every other species and chara ter of property—that which is tangible as well as that whic is intangible. Act of 1906 chapter 22."

If the property sought to be taxed is personal propert then the controlling law in levying taxes is the Constitutio of Kentucky, and the sections cited on page 2 (TR) i clusive of sections 172 and 174.

Now these sections of the Constitution provide that taxe must be uniform, and collected for public purpose, and a taxes shall be collected by general law. The assessment taxes here does not provide for a hearing when an assess ment is complained of. Therefore there would be no ad quate appeal from a wrong assessment. This tax on whisk

is also levied under a special Act without constitutional hearing and a record in this case shows that no such hearing was had.

Section 59 of the Constitution sub-section 29, provides that no special law shall be enacted where the subject is coverd by a general law or can be covered by a general law.

Exhibit A, page 24 (TR) shows that the hearing was, not whether a proper assessment had been made, but the notice was determined whether the Central Distributing Company's liquor license was not to be revoked. These were charges under the Act, this officer says, of 1936, a supplemental tax Act or revision tax Act of the Act of 1934, which latter Act was void, and being void, no supplemental Act or revision Act of the 1934 Act could be valid; the charge in the letter Exhibit A (TR) could not be sustained as a matter of law, the basis of which was an investigation made by a field officer, who apparently determined the tax. No authority could be given him or Mr. Hageman, the Revenue Commismissioner, to impose a tax under what must be called a special Act of the Legislature or under a regulation passed by a Board created under the Act of 1934, because that Act was void on its face, and had no force in law, and therefore there could be no valid or legal hearing under it for any purpose.

Section 59 of the Constitution of Kentucky is a prohibition to the legislature against the passage of special laws, and the tax section, 171, of the Kentucky Constitution prohibits such a law and the authority of such an officer. Under section 4 of Exhibit A, claim is there made by the commissioner for due import taxes which would be pressed as a ground for the revocation of the license of Central Distributing Company, and a failure to report such taxes would also be a ground. This Act of March 7th, 1938, succeeded the Act of 1934, while these charges were pending, and they were again resumed on April 5, 1938 by another officer created under the Act of March 7, 1938, who cites Central Company in section 3, Exhibit B as violating the Beverage Alcoholic Control Act of 1934.

Now then the Central Distributing Company, was on thi date called to answer charges under the repealed Act o 1934, which, as we have said, was an Act licensing the sal of whiskey as a beverage, and void under Amendment of the Constitution of Kentucky, and if void as a beverag Act, the supplemental Act of 1936 was void, because i sought to levy a tax on the sale of whiskey as a beverage It is incomplete in itself.

The law in Kentucky at that time was established.

In Brady vs. Bannon, 134 Kentucky, page 769, it wa held, that to prevent the collection and imposition of such tax, injunction is the proper procedure. Also, in Gates vs Barrett, 79 Kentucky, page 295.

The law of Kentucky is ably discussed in Hagar vs. Wal ker, 128 Kentucky, page 1. A tax case under amendment 7 There, it was held that no such tax could be levied in such case that is here contended for.

In Craig vs. Renaker, 201 Kentucky, page 582, and in Morganfield vs. Wathen, 202 Kentucky, page 647, there will also be found absolute affirmance of the position here taken, not only as to the lack of uniformity of these taxes, but that they were invalid under the 7th amendment, and if invalid no license could issue therefore, nor could there be a violation of the Act of 1936, revision of 1934, which did not exist. Kentucky Constitution, section 51 provides how a revision may be made.

The illegality of such a tax is considered in the cases of Frieberg vs. Dawson, 274 Federal, page 420, a decision by the Sixth Circuit, that injunction is the proper remedy, and that the tax as levied was a property tax, and void under the Constitution of Kentucky, a 50 cent withdrawal tax, while there was on the statutes a 3 cents per gallon tax. The injunction was issued.

The Supreme Court of the United States in Dawson vs. Kentucky Distilleries, 255 U. S., page 288, affirms the hold- ing of the Sixth Circuit.

In RESPECT of the Act of 1934, it is clearly void, but if it had been valid, and repealed, there could be no proceeding for an offense committed under it or April 5th, as is shown by Exhibit B, page 26 (TR).

In Speckert vs. City of Louisville, 78 Kentucky, 88, the Court of Appeals said:

> "When repealed it must be considered as a law that never existed for the purpose of those actions or suits which were commenced, prosecuted and concluded while it was an existing law. Upon this principle the repeal of a statute puts an end to all prosecutions, and to all proceedings growing out of it, pending at the time of repeal. And if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law when their decision is rendered. It follows therefore the warrants must be desmissed."
>
> "When a statute is repealed that ends litigation under it, and the repeal of the law imposing a penalty is in itself a remission."
>
> Lewis vs. Poster 1., New Hampshire.

Thus again, we find the property, securing mortgage of Appellants was illegally seized for a tax that was never legally levied, and on any view of the Act of 1934, the supplemental Act of 1936, and the present Act of 1938, there was no valid authority acting on a valid claim for taxes, and no jurisdiction anywhere to impose, no valid thing to impose, and no valid court imposing, and no hearing or summons that could satisfy the 14th Amendment.

So also, there was no valid assessment:

Russell vs. Carlisle, 10 Kentucky Law Rep., page 25;
Royer Wheel Co. vs. Taylor Co., 104 Kentucky, 742;
Louisville Tobacco Warehouse Co. vs. Commonwealth, 106 Kentucky, 165—see sections 4028 and 4029 on penalties and how collected. (Carrolls Statutes).

On the question of the effect of the repealed statute, we cite these Federal cases of Railroad vs. Grant, 98 U. S., 398-401;

Coe vs. Errol, 116 U. S., page 517;
Baldwin vs. Seelig, 294, page 516.

Argument 6, Point 1

Sections 109, 125, 126, of the Kentucky Constitution limit the exercise of Judicial Power to the Courts, and the power here attempted to be delegated to these individuals as shown by the citations exhibit A and B, pages 26 and 28 (TR) to be exercised by them is a violation of the Constitution. Under section 380 of the Judicial Code it is provided that an interlocutory injunction may be issued against the abuse of power by a state officer, in favor of the person injured. Unquestionably the damage committed by such officers here was irreparable and immediate. The authority is ruthless and asserted in defiance of Constitutional safeguards.

In the latter case it is said:

> "Without passing on the question of constitutionalities the court dismissed the Bill for the reason that the complainants had an adequate remedy at law, and the correctness of the decree of dismissal is the question now before us on direct appeal". The dismissal was held to be error, the petition stated a cause of action for aquitable relief. And in Terrace vs. Thompson, 263 U. S. 197, 68 Law Edition 255, it is held: "But the legal remedy must be as complete, **practical, and efficient as that which equity could afford.**"

Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravences the Federal Constitution where-ever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and, in such a case a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who

threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, my be enjoined from such action by a Federal Court of Equity.

Cavanaugh vs. Looney, 248 U. S. 453;
Truax vs. Raich, 239 U. S. 33;
Packard vs. Banton, 264 U. S. 140, 68 L. Ed. 596.

Argument 7, Point 16

The Revenue Commissioner of Kentucky had no authority to maintain any action against the Central Distributing Company, Inc. "The said J. W. Martin, Revenue Commissioner, under attachment process closed the place of business of petitioners without legal or statutory authority of the State of Kentucky in this proceeding (see amended petition). T. R. page.

Section 4260c, (Carrolls Statutes), (Act of 1912), chapter 116, is the authority for the Revenue Commissioner to act, we think. This Act was in full force at the time the attachment suit was brought, and it is the controlling law of Kentucky. It reads:—"No revenue agent shall be permitted to collect any moneys due either the state or any county without special written authority from the Auditor. Should any such revenue agent violate the provisions of this section, he shall be deemed guilty of a misdemeanor and, upon indictment in the county in which said acts were done, and conviction, he shall be subject to a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), and removal from office. (1906, c. 22, p. 88, Art. XVII, 7.)

The auditors consent had not been procured, and no such authority could have been granted in this kind of case, because the statutes of Kentucky, section 4261, provides (Carrolls) "He shall report to the Commonwealth's Attorney, County Attorney or Grand Jury all persons who may be guilty of violating the laws governing license taxes, and shall cause said offenders to be prosecuted; and in all cases

where the person so reported or prosecuted shall be granted license, and shall pay the tax and penalty of twenty per cent (20%) as imposed by law, the revenue agent who reports the offender, and who causes the payment of such license and penalty, shall be entitled to receive such penalty of twenty per cent (20%) as compensation for his services. (1906, c. 22, p. 88, Art. XVII., 8)."

The remedy in the state court is not adequate.

Dawson vs. Kentucky Distilleries, 255 U. S., page 288;
Smythe vs. Ames, 169 U. S., 466;
Alabama Railroad Company vs. American Cotton Oil Company, 229 Federal, page 18;
Texas Pacific Company vs. Cox, 145 U. S., 593;
Gates vs. Barrett, 79 Kentucky, Supra, where an injunction was issued to enjoin the collection of an invalid tax.
Hegley vs. Henderson Company, 107 Kentucky, page 414;
Metcalfe vs. Watterson, 128 U. S., page 586.

"The Remedy is in the Federal Court".

Cowley vs. Railroad, 159 U. S., page 569;
Regan vs. Farmer's Loan Company, 154 U. S., 362.

The Circuit (District) Court has jurisdiction, not only on the ground of diverse citizenship but upon the further ground, that, as the statute of Nebraska under which the Board proceeds is assailed as being repugnant to rights secured to plaintiffs by the Constitution of the United States, and in such a case the proceeding may be regarded as arising under that instrument.

If the remedy is doubtful by action at law, equity has jurisdiction to enjoin the collection of a discriminatory tax.

In Brown vs. Maryland, 12 Wheat. U. S., 419 it is said:

> "All must perceive that the tax on the sale of an article imported into the state is a tax on the article itself."

Frieberg vs. Dawson, 274 Federal, 430.

Constitution of Kentucky, section 171 places a limitation on the legislature by these words—"Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax."

This authority of course does not extend to Ohio in interstate commerce, and it has been held that a tax cannot be levied on imports by a state. Therefore a permit required before the liquor could come into the state would be without legal sanction.

See 23 at page 35 (TR) which calls for a tax on imports. "Every person who purchases distilled spirits, and has the same shipped into the state of Kentucky from points without the state, as provided in section 5 hereof shall at the same time said permit is issued pay a license tax thereon of 5 cents per gallon." This is an evasion—a subterfuge.

Section 174 of the Kentucky Constitution, is another limitation on taxation (TR) section 25, page 35.

> "All property whether owned by natural persons or corporations shall be **taxed in proportion to value**—and all corporations shall pay the **same rate of taxation** as individual property."

Five cents per gallon levied indiscriminately on whiskey worth forty five cents per gallon and five cents per gallon on whiskey worth $18 per gallon, violates this provision of the Kentucky Constitution. See, the affidavit of O. A. Pieper, where he said, (page 21 TR) and N. McDowell, same page (TR) that whiskey six months old is worth $12 per case (3 gal.) and fifteen year old whiskey is worth $70 per case.

So we see that under the Kentucky Constitution alone the tax is an invalid tax.

Federal Authorities on this tax

Section 41 (8) 28 U. S . C. A.
Art. 1, section 8, Constitution of United States.

If liquors in interstate commerce are not intended to be used in the state, they are not subject to state regulations. Such shipments must be received, possessed, sold or used in violation of state laws.

Clark Distilling Company vs. Western Maryland Railway Company, 242 U. S., 311.

The state regulation of highways must not interfere with interstate commerce.

Hodge vs. Cincinnati, 284 U. S., 335;
Stephenson vs. Binford, 287 U. S., 251.

Regulation of commerce between the states in committed solely to Congress and this control is exclusive of the states.

Ohio vs. Thomas, 173 U. S., 276;
Melson vs. Commonwealth of Kentucky, 279 U. S., 245.

Interference with a single carrier constitutes a prohibited interference with interstate Commerce.

Louisville and Nashville R. R. Co., Eubanks, 184 U. S., 27., 58 Supreme Court (L. Ed.) page 914.

Until such transportation is completed by delivery no burden can be placed on it by state law, section 8, Art. 1, U. S. Constitution.

Furst vs. Brewster, 282 U. S., 493.

Congressional legislation is supreme.

Missouri Pacific vs. Stroud, 267 U. S., 404;
Asher vs. State of Texas, 100 U. S. 339, and 128 U. S. 129;

In Gudger vs. U. S., 249, a transport of whiskey was stopped in Virginia, then a dry state. It was released under the inter-state commerce doctrine.

Carson vs. Petroleum Co., 279 U. S., 95;
L. and N. Railroad Company vs. F. W. Cook Brewing Company, 223 U. S., 568.

The state may under the 21st Amendment, exercise police power, but this power is limited under this Amendment to **use** and **delivery**, and has no relation to the power to raise revenue by the state. Taxes qualify under the latter power.

Farmer's Grain Company, 268 U. S., 189;
Penna vs. W. Va., 262 U. S., 553;
Crutcher vs. Kentucky, U. S. 141 at page 47;
Kidd vs. Pearson, 128 U. S., 1-20-32;
Magnuson vs. Kelly, Kentucky Comsr., 35 Federal (2nd) 867;
Perkins vs. U. S., 35 Federal (2nd) 849.

Insofar as whiskey is an article of commerce, its regulation is exclusive in the Congress.

Pacific Produce Company vs. Martin, 16 Federal Supp. page 34;
McCormick and Co. vs. Brown, 286 U. S., 131;
Dugan vs. Bridges, 16 Supp. (Fed.) page 700 and 634.

If the state legislation relates to the police power and has only an incidental effect on Commerce the legislation is valid.

Nashville, Chattanooga and St. Louis Railway Company vs. Alabama, 128 U. S., 96;
Hennington vs. Georgia, 163 U. S., 299, 166.

These authorities all make it clear that the legislative enactment of the states passed under their admitted police powers may be exercised until Congress acts.

From the early days of the Webb-Kenyon Act up to this good hour the police power is with the states to protect the health of their own people, hence the words **use, delivery etc.** are significantly used. By the widest stretch of imagination could the state's exercise of police power have

any relation to the imposition of taxes, either by a device called a permit or directly on the article transported. In each case it would be a tax on the imported article, the Federal Commerce Clause remains supreme and taxation may not be imposed by a state on imports. So that when Appellees motion to dismiss was sustained, it was sustained on the ground Appellants had an adequate remedy by suit; exactly opposite to this did this court decide in the case of Dawson vs. Kentucky Distilleries. 255 US 288

There is no decision that supports the action of the Three-Judge Court, which assembled under Judicial Code, section 266, or that holds they had a right to sustain a motion to dismiss; for Acts under 1934-36 are void.

There is no case holding that where Congress has acted in a matter of national concern, that the state may occupy the field with regulatory force, and in tax matters this has no single variance or exception.

Until there is some respectable authority it would appear there was no justification for the dismissal of the Amended Bill, when it was in fact a suit to recover money had and received, both by the Central Distributing Company and the Revenue Commissioner, acting for the state. It was money had and received, arbitrarily closing all resources against the Appellant's collection of their debt.

West vs. Natural Gas Co., 221 U. S., 229.

In Simpson vs. Shepherd, 230 U. S., 352, Mr. Justice Hughes stated the rule: "If a state enactment imposes a direct burden upon interstate Commerce it must fall, regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which, in the absence of Federal regulation should be free."

Robbins vs. Taxing District, 120 U. S., 489—the national law the Constitution of the U. S. applies, Art. 1, section 8, taken with the direct prohibition against levying of import taxes; and that Congress alone may levy such a tax on im-

ports for inspection of the importations to protect health, and the cost of that inspection is the limitation on Congress.

Thus it is clear that the issue here made and admitted entitled Appellants to injunction.

Section of the Law 4265 Carrolls Statutes prevents the Revenue Commissioner from incurring any expense against its credit—not liable for costs.

No bond shall be given as in the case of individuals, which left Appellants without remedy.

Argument 8, Point 14

Assignment of Error 10 Subsection (b)

This assignment and point attacks the validity of the tax for which the levy was made.

Manifest inequality through arbitrary classification will not be sust..ined; and the tax must be **uniform** within the territory as to class of subjects on which it is laid.

This doctrine was established in California, under similar provisions in Ward vs. Flood, 48 California, page 51.

The equal protection of the laws is guaranteed by the 14th Amendment, and this can only mean that the laws of the state must be equal in its benefits and burdens, for less than this would not satisfy the equal protection of the laws.

Greene vs. L. and N. Railroad, 244 U. S., 499;
Commonwealth vs. Louisville Gas Company, 122 S. W., 164;
Macon Grocery Company vs. Atlantic, 215 U. S., 501;
California vs. Southern Pacific, 157 U. S., 269;
Ex Parte Virginia, 100 U. S., 339;
City of Knoxville vs. Southern Con. Company, 220 Fed., 236;
J. and A. Frieberg vs. Dawson, Supra it seems to us, decided under these tax provisions and which analyze the same remedy under the laws of Kentucky, holding there is no adequate remedy, settle this cause.

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The statute relied on by the Court, never existed, no repealed, is section 2 of the (green book) Record, not 1 as stated by the Court, is as follows:—

> "The aggrieved Permittee or taxpayer shall pay th tax or fee as and when required, and may at any tim within two years from the date of such payment su the Commonwealth through its Agent, the Auditor o Public Accounts, in an action at law in any cour **State or Federal,** otherwise having jurisdiction of th parties and subject matter."

The appropriate Federal Statute is section 266 of th Judicial Code as amended, Title 28, section 380 als Amendment of February, 1925, C. 229, section I, 43 sta utes of 938, (against illegal statutes of state).

Our allegation is in the Amended Petition.

We will examine this ground in the light of previous de cisions in Kentucky—the writer of this brief having bee a member of the Constitutional Convention and jointly wit John D. Carroll, of Carroll's Code fame were the autho of these tax provisions. (TR page 2).

Exhibit C (Page 1 TR)

Property, which is whiskey, section 172, Constitution o Kentucky, must be assessed at its fair cash value, and an officer who fails to so assess it will be guilty of misfeasanc and upon conviction shall forfeit his office, so there is litt the legislature can say about it, for the forfeiture is her only an additional penalty may be fixed.

Section 171, Exhibit D (TR page 2)

"Must be levied by General Laws, for public purpose and must be uniform", and we may add the requiremen of Exhibit C. "fair cash value".

Exhibit E (page 2 TR)

Section 174. "It must be taxed like individual property and shall be taxed in proportion to its value". It shall b

taxed at the same rate of taxation paid by individual property'.

Section 181, found in the Statement of Jurisdiction, provides for uniformity, specifically, also.

See the affidavits of McDowell and Pieper at (page 20-21 TR) McDowell:

"That a tax of the medium or lower grades of whiskey as to age is confiscatory, this whiskey being marketable at from 45 cents per gallon to $1 per gallon, or (as) (in) cases from $13 per case to $18 per case, with the tax".

"The buyers will not pay the price including the tax, and that prior to the imposition of the tax, business was good." . . . ."Fifteen year old cased whiskey of the Bourbon type is worth $70 per case, and four year bonded whiskey is worth $31 per case."

Pieper (page 21 TR)

"West Point is $9 per case of quarts, and the price of Grandad or Old Taylor is $30.12 per case of quarts, and the price of 15 year old Sunnybrook, (the highest priced) is $70 per case of quarts.'

After the 1936 Act was passed the profits were curtailed, says Pieper, and many wholesalers went out of business, they discontinued their business after spending large sums of money to build up—they diverted their business to other states because it was impossible for a retailer in the state of Kentucky on account of the aforementioned tax to make anything.

So says Oscar Bayer; so says Jacob Smith and others. According to this undisputed testimony, the 1936 tax, supplemental Act of the 1934 Act, or as the Commissioner calls it, a revision Act, the law was:

Confiscatory, under the decisions of the Court of Appeals.

Discriminatory under the decisions of the Court of Appeals.

Was not assessed at its fair cash value, as provided i section 172 of the Constitution of Kentucky, and i was a special law.

Was not uniform under sections 171 and 181, and th Act was not enacted as a General Law, but was "revision" Act of the 1934 Act, which was void.

Section 51 of the Constitution provides just how a la shall be revised or amended, which is as follows:

"No law enacted by the General Assembly shall relate t more than one subject, and that shall be expressed in th title, and no law shall be revised, amended, or the provision thereof extended or conferred by reference to its title only but so much thereof as is revised, amended, extended o conferred, shall be re-enacted and published at length."

Board of Penn. Com. vs. Spencer, 159 Ky. 255.

The tax Act of April 9, 1936, has the following title:

"An Act relating to revenue and taxation" on the sal and distribution of alcoholic beverages, and declaring a emergency.'

This title is clearly in violation of section 51, because th Act itself attempts to treat the subject of an additional pre scription for medicine, for hydrated oxide of ethyl, fron whatever source about whatever precess produced. It als treats the subject of the transportation of liquors and re quires that liquors exported from the state be sold only t retailers in other states, provides for general authority fo the Revenue Department, disregarding the tax provisions o the Constitution of Kentucky. It also provides for a specia law on attachment contrary to the provisions of the Genera Law of the Kentucky Statutes, and for the issuing of injunc tion against the operation of the business of wholesalin and retailing liquor. In other words it is a flagrant viola tion of the constitutional provisions above quoted, an generally partly against special legislation.

It is also a violation of Section 59 of the Constitution which reads: "the General Assembly shall not pass loca

or special acts to authorize or regulate the levy, the assessment or collection of taxes." It violates subsection 29 of section 59 which provides, that in all cases where a general law can be made applicable no special law shall take effect. It is also contrary to the Bill of Rights of the Constitution of Kentucky section 3 thereof, which provides "that no property shall be exempt from taxation except as provided in this constitution."

The taxation of whiskey at $1.04 per ~~case~~ gal., worth $70 per case (3 gals), and the taxation of a case worth $12 (3gals), or worth 45c per gallon, is a clear exemption of the $70 per case whiskey. In other words, **based on cash value,** as provided in Section 172 of the Constitution there in an exemption of between $12 and $70 per case in favor of the higher priced whiskey. Now it is useless to follow in detail these provisions of the act of 1936 or to detail what is legislative power and what is judicial power under the Constitution of Kentucky, because the Constitution defines, in section 27, 28, 109 and 135 what is the limitation of judicial power.

The Court of Kentucky has repeatedly held that the Board of Railroad Commissioners have no such authority as the legislature conferred on the Revenue Commissioner and the Kentucky Alcohol Beverage Board, in respect to shipment, of taxation, and of the general regulation of liquors. They may confiscate whiskey without a hearing, and a Revenue employee is authorized to seize whiskey and confiscate it without a hearing. The writer does not know of a single case where the Bill of Rights of the Constitution of Kentucky, section 10, has been complied with. This section makes it impossible to seize any property without first describing it and applying to a court of competent jurisdiction for a warrant. The constitution provides that an officer may not seize any person or thing without describing them as near as may be.

Section 28 of the Constitution provides that no such officer may exercise any power properly belonging to the judicial or legislative departments. Section 135 provides that no courts, save those provided in this Constitution shall be established with judicial power.

The Court of Appeals of Kentucky held in the L. and
Railroad Company vs. Greenbier Distillery Company, 1
Kentucky, page 775, and the L. and N. Railroad Compa
vs. Garrett, 231 U. S., page 298, that the Railroad Comm
sion of Kentucky could not exercise any judicial power su
as is conferred on the tax commission under the 1934 A
the 1936 Act or the Act of March 7, 1938. This latter A
we have assailed as unconstitutional as well as the Act
1936, in our amended petition found at page 8 subsecti
C of paragraph 10, and we have also assailed in section
of our amended petition the unconstitutionality of the
taxes as a violation of, not only Article 1, Section 8, of t
Constitution of the United States, but the Interstate Co
merce Laws, and the 14th Amendment to the Constituti
of the United States.

Cumberland Tel. Co. vs. Hopkins, 121 Kentucky, 8

The Act of 1934, called the Kentucky Alcohol Cont
Act specifically prohibited the manufacture, sale, tra
portion, possession or the disposition of spiritous, vino
or intoxicating malt liquors, except for medical, sacramen
and scientific purposes.

Yet it specifically licenses wholesalers and retailers
sell whiskey as a beverage and provides penalties also
the manufacture of whiskey.

Just how such vicious legislation, contravening not o
Amendment 7 of the Constitution of Kentucky, but eve
other provision relating to taxation is hard to envision, t
any intelligent body of men could be induced to adopt

Not only did that Act provide for a five-cent per gal
ad-valorem tax, but the Act of 1936 and 1934 both p
vided for this five-cent tax. The Act of 1936 and 1934 p
vided for a five-cent per gallon import tax, and the Act
1936 alone provided for an additional ad-valorem tax
$1.04 per gallon, regardless of the fact that such taxat
is specifically prohibited by the Constitution of Kentuc
Section 175 of the Constitution prohibits the extension
any relief from taxation or that any power of the Comm

wealth shall be delegated or suspended. It has been repeatedly held by its Court of Appeals that a license tax may be impossed upon a business in addition to an ad-valorem tax, but not as a substitute for it, but no two ad-valorem taxes may be levied against the same product.

The Revenue Commissioner and his Board of Control have also established a regulation that half-pints shall be taxed at the rate of $3.36 per case, and pints and quarts at the rate of $3.12 per case, which is a violation of section 174 of the Constitution which provides that taxes shall be levied in proportion to the value and at the same rate.

The Court of Appeals of Kentucky held in the case of Morrell Refrigerator Car Ca., vs. Com., 128 Kentucky, 447, that an arbitrary classification of subjects of taxation for purposes of taxation was void.

It held in the Commonwealth vs. Southern Pacific Company, 150 Kentucky, page 97, that the assessment of railroad property was exclusively in the power of the General Assembly, as to method of assessment and classification.

The Court of Appeals held in Holtzhauer vs. City of Newport, 94 Kentucky, page 396, that levying taxes under section 171 of the Constitution must be made according to value and that this was the law of Kentucky prior to the adoption of the present Constitution.

It held that licenses must be uniform under the Constitution of Kentucky in the case of Hager vs. Walker, 128 Kentucky, page 1.

The Court of Appeals of Kentucky held in Greene vs. L. and I. Railway Co., 244 U. S., 499, that section 174 of the Constitution which provides that all corporate property shall pay the same rate of taxation paid by individual property meant that not only the percentage of the rate, but the basis of the valuation, shall be the same.

The Court of Appeals held in the case of L. and N. Railroad Co. vs. City of Barbourville, 105 Kentucky, page 174, that section 172 of the Constitution was self-executing, re-

quired no legislative provision to vitalize it and that, assessment of property, of all kinds must be based on the fair cash value of the property.

Therefore, the Legislature could not make any different provision nor could it levy any different rate on whiskey unless it was based on the value, which value must be ascertained upon some definite method of assessment, and no definite method of assesment was provided for in any of these Acts. They decided in Commonwealth vs. Taylor, 101 Kentucky, page 325, that a mode of assessment of distilled spirits was necessary, and that while the method might be special the assessment must be general.

They said also in Stewart Co. vs. Lewis, 7, F. Supp. 438, United States 294, page 550, that the Bill of Rights in respect to Taxation must be taken into consideration. This meant a strict Constitution of every tax Act.

They held however in the Standard Oil Co. vs. the Commonwealth, 119 Kentucky, page 75, that the Legislature could not impose double taxation in more than one license tax under the excise provision of the Constitution. That this would be double taxation, prohibited by the Constitution of Kentucky. They held also that a State Board might be created which might place the valuation upon franchises as well as property taxed on its fair cash value provided the machinery and method of taxation was specified in the Act. and furthermore that the assessment must be uniform upon all classes of property, and that the assessment must not be arbitrary or confiscatory.

Argument 9, Points 14 and 15, Section 9 Petition

"That said Act (April 9, 1936) lacks uniformity in its operation, and is an arbitrary classification of Liquors, for taxation, in violation of the Constitution of the State of Kentucky, sections 171, 172, 174 and 181, as alleged, discriminatory and confiscatory".

This is the allegation of the Petition, and if sound then

there could be no dismissal for lack of a stated cause of action.

In Martin vs. Norcero, 269 Kentucky, 151, the question of Discriminatory tax was involved:

In this case the Court of Appeals held that a tax of 28 cents on a gallon of Ice Cream was confiscatory. Already on the cost price of whiskey the total tax on whiskey amounts to near about 1700%-rating the actual cost of 25 cents per gallon. Answering the statement that the Legislature may by taxation exterminate an industry rather than penalize it, we should not confound this doctrine with a lawful commodity doctrine and an unlawful commodity doctrine, as each relates to taxation. Nor should we overlook the fact that taxation in Kentucky is strictly under tax provisions of the Constitution, and within the limitations there expressed, so we may dismiss the foregoing doctrine as having no application.

Whiskey is property, as defined by the statute, and under section 172 of the Constitution it must, when assessed for taxes, be assessed at "ITS FAIR CASH VALUE". We find here that six months old whiskey (McDowell at page 20 TR) Quote: "That a tax on the lower and medium grades of whiskey as to age is confiscatory, this whiskey being marketable at from 45 cents per gallon to $1 per gallon". See also other affidavits in the unprinted record and the TR at page 21 A. O. Pieper. 33-34-36 (Omitted Record) Original. Corporation property (whiskey in cases) must be assessed the same as "individual property". This says the same rate. Exhibit No. TR 2.

If Ice Cream, for instance will not stand a tax of 28 cents per gallon, when selling at from 70 to 80 cents, how is whiskey selling at from 45 cents to a dollar going to stand a state tax under this indentical provision of the Constitution of $1.0[illegible] cents per gallon, both ad-valorem taxes. This means the tax is more than twice, the or "its fair cash value, estimated at the price it would bring at a fair voluntary sale." McDowell calls it "marketable", which is the same as "voluntary sale", the latter, the words of the Constitu-

tion, section 172. The Court of Appeals has decided that the Legislature has the sole authority to fix the rate, method and value of taxed property, subject to the limitations expressed in the Constitution. So we have the Legislature assessing by the gallon, at more than twice the "marketable" value or "fair cash value" of the product, and this in face of the fact that the article already bears a Federal Tax of approximately 700% on the selling price, and 1300% on the cost price of the article, 45 cents, selling and 25 cents cost.

This tax is not only a plain violation of the Constitution, but its confiscatory under the decisions of the Court of Appeals of Kentucky. Can it stand then?

> New State Ice Cream Co. vs. Liebmann, 282 U. S., 262;
> Stewart Dry Goods Co. vs. Lewis, 294 U. S., 550;
> Glenn vs. Field Packing Co., 290 U. S., 177.

"The tax hereby imposed is not to be collected if the result will be to wipe out the profits of a business conducted with ordinary efficiency, or to reduce the profits to a level unreasonably low". This is the language of Justice Cardozo in the Stewart Dry Goods case under the same provisions of the Constitution.

The Court of Appeals of Kentucky, in City of Louisville vs. Pooley, 136 Kentucky, 286 said:

> "While it is true that the amount of a license fee imposed as a tax is ordinarily a question for the taxing power and the Courts will not interfere with its discretion, yet this Court is Committed to the doctrine that this rule is subject to the LIMITATION that the tax imposed should not amount to a prohibition of any useful or legitimate occupation."

The Bill of Rights of the Kentucky Constitution includes section 1 to 26, inclusive, prohibits special levy for taxes. Is Liquor-selling, a useful occupation or legitimate? So long as the law-making power says that it is, that ends the argument.

Mr. Pieper at TR 22 said:

> "The profit was greatly curtailed to the wholesaler as well as the retailer on the cheaper grades of whiskey sold, thus causing many and divers wholesalers and dispensers who were operating prior to the enactment of the 1936 tax Act, to suspend operations, and compelling them to discontinue their business upon which they spent large sums of money to build up, by reason of a great many consumers having purchased formerly their whiskies and spiritous liquors from retailers in the State of Kentucky, and by reason of said tax, having diverted their purchases to other neighboring states on account of it being impossible for a retailer in the state of Kentucky to compete with the prices of other states on account of the aforementioned tax."
> Here you have the uncontradicted result.

There is no limitation in the Constitution on the amount of tax levied on franchises or licenses, yet there is no doubt if it should be so unreasonable or arbitrary as to amount to a confiscation of property the Courts would interpose on the ground that it was violative of the Bill of Rights which provides the right of acquiring and protecting property as a Constitutional guarantee.

Hager vs. Walker, 128 Kentucky, page 1.

But a limitation is placed on the levy of taxes on "property-" subject to taxation. It must be uniform, it must be taxed as individual property, it must be based on the CASH VALUE, it must not be discriminatory, it must not be confiscatory. These are all limitations, which considered together make this tax impossible.

In Dawson vs. Kentucky Distilleries and Warehouse Company, 255 U. S., 288, a tax was under review levied under the sections of the Kentucky Constitution whereby the legislature attempted to evade the "fair cash value" provision and the uniform provision. They called it an annual license tax, a privilege tax, providing for withdrawal at 50 cents per gallon.

The Court said:

> "The name by which a tax is described in the Statute imposing it is immaterial. The character must be de-

termined by its incidents, and, obviously it has none of the ordinary incidents of an occupation tax. To levy a tax by reason of the ownership of the property is to tax the property. It cannot be made an occupation or license tax by calling it so."

Said Judge Carroll in Hager vs. Walker, 128 Kentucky, page 1. "The fundamental idea of taxation is that the burdens shall be borne equally and alike by all persons, and that no one class shall be taxed for another, or one class be discriminated against to be advantage of another, or an exemption allowed one that is not conceded to another."

Section 181 and 182 which are not applicable here however prove the intention of the Constitution makers to adhere to the idea that no taxes shall be levied except by general laws, and this rule applies to municipalities as well as the state.

Here we have a 5 cent per gallon tax which under the Dawson case is an ad-valorem tax, (then it was 3 cents) and to avoid two ad-valorem taxes, the legislature, as we see, called it a withdrawal privilege tax, which the Supreme Court denounced as a subterfuge.

Sperry and Hutcheson vs. Owensboro, 151 Kentucky, 389.

This Court in Colgate vs. Harvey, 296 U. S., page 404, said: that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the subjects of the legislation so that all persons similarly situated shall be treated alike.

State vs. Hoyt, 71 Vermont, 59, 64-66 and 42 A. 973.

Here we have a tax exempting owners of aged or $70 per case whiskey, the difference between $12 per case whiskey and that sum for aged whiskey, a substantial difference of $58. In other words, a tax more than five times as much on the man who owns $12 whiskey per case at market value,

and so this court blankets that situation in the Harvey case, Supra.

> "Does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation. Mere difference is not enough."

Therefore, the tax imposed is not only contrary to the equal protection laws clause of the Fourteenth Amendment of the United States Constitution, but also violates the Bill of Rights of the Kentucky Constitution, and is contrary to sections 171, 174, 172 and 181 of said Constitution.

It denies due process under the old decision of McCullough vs. Maryland, 17 U. S., 316.

It confiscates property under the decision of Bushaber vs. Union Pacific Railroad, 240 U. S., 1 to 5.

It is an arbitrary classification under Nichols vs. Coolidge, 274 U. S., 531.

Hiner vs. Donnan, 285 U. S., page 312.

The distinction between state constitutional restrictions of the different states is pointed out in Magano vs. Hamilton, 292 U. S., page 40, and Glenn vs. Field Packing Company, 290 U. S., 177.

The question always to be considered is, what restrictions are laid in the constitution under which the tax is levied.

This Act of 1936 attempts to burden interstate commerce with the tax.

> "Every person who shall import any alcoholic beverage in Kentucky for the purpose of sale in any other state is hereby required to transmit to the Commissioner of Revenue within 24 hours after receipt of same an original copy of each invoice for such beverage."

Section 15, of the 1936, tax Act, provides in Section six (blue book). "Nothing in this Act shall be construed to re-

quire the payment of the tax imposed herein on the sale of the same alcoholic beverages more than once." Original 9

In spite of this section, the Revenue Commissioner, assumes the authority, and exercises it, to require a tax from the wholesaler, Central Distributing Company, Inc. on whiskey purchased by it in the state before it is sold, when that same whiskey has already been subjected to a gallonage tax of 5 cents, a property tax, not a privilege tax, because a license is imposed of $500 on the distillery for the privilege of manufacturing and distilling whiskey.

Section of the Blue Book record (Transcript, not printed) H-9 reads: "The wholesaler who purchases or otherwise acquires title to any Alcoholic beverage made taxable by this Act etc.," and section 6, same reference See H record Original 9.

> "The wholesaler or manufacturer who imports any alcoholic beverage shall pay the tax imposed in this Act."

Now then we have a tax of five cents per gallon imposed on the manufacturer, then $1.04 per gallon on the wholesaler. We have a license paid by the Distiller and a license tax paid by the wholesaler. Thus two ad-valorem taxes are imposed on the same gallon of whiskey. In the Dawson case supra. there was 3 cent gallon tax paid by the Distiller and a withdrawal tax of 50 cents per gallon paid by the wholesaler or distiller. The state confessed the 50 cent tax could not be levied, after the court indicated it would hold it to be a property tax. Such now is the plain case here, as shown by the 1934 Act, five cents paid by the Distiller, which cannot be called a license tax, because he has paid one, $500. But as shown, the very principle announced in the Act of 1936, that no two taxes should be levied on the same whiskey, was by arbitrary exercise of power, levied to the wholesaler on the same whiskey, on which there had been a tax of 5 cents already paid by the distiller, and we have a double tax on property, the same property.

We repeat again, the provision of the 1936 Act, section 15 — Blue Book, record. H. 9.

> "Nothing in this Act shall be construed to require the payment of the tax imposed herein on the sale of the same alcoholic beverages MORE THAN ONCE."

Thus we contend, had the Central Distributing Company not paid the alleged taxes said to be due, and for which its property was attached, since it had paid a license tax of $1000, a property tax could not be imposed on the same beverage, inasmuch as the Distiller had already paid an ad-valorem tax, and another of $1.04 could not be levied on it again and charged to the wholesaler.

As to the whiskey imported, no burden could be placed on the liquors for any reason or purpose—they were in transit.

Alabama Railway vs. American Cotton Oil Company, 229, Federal, page 11;
Southern Pacific Company vs. Corbett, 20th Supp. 940;
Arkansas and Louisana Pipe Line Company vs. Coverdale, 20 Supp., page 676;
Pacific Fruit Company vs. Martin, 16th Supp. 34;
Highland Farms Dairy vs. Agnew, 16 Supp., page 575;
Vance vs. Vandercook, 170, U. S., pages 439 to 447;

As to the double ad-valorem, assuming the above 1936 void, the Constitution prohibited two taxes of the same kind —section 174 authorizing one license tax, and section 172 authorizing one cash value levy on the property, either real or personal, and 171, prohibiting a tax not uniform and one not levied under a general law.

On this ground a double taxation, the tax was void.

Com. of Ky. vs. Walsh's Trustees, 133 Ky., 112;
Campbell County vs. City, 174 Ky., 712;
Cumberland Tel. Co. vs. Hopkins, 121 Ky., 850.

No Remedy at Law—the remedy held sufficient by the Three-Judge Court, not sufficient.

The jurisdiction of the Federal Courts cannot be defeated by a prescribed form of recovery by the legislature.

C. and G. Company vs. Harris, 235 U. S., page 292; Hunter vs. Conrad, 85 Federal, 803.

The guarantee of the 14th Amendment is the immediate and effectual right to protect the citizen, and here we have the requisite diversity and amount, and a cause of action stated for injunctive relief, but if not, then a cause of action.

The case of Smith vs. Wilson, 273 U. S., 388, holds that it was the duty of the Three-Judge Court to send the case back to the district court of Eastern Kentucky for trial on the merits under issues as made, since they held there was jurisdiction.

Ex Parte vs. Buden, 271 U. S., 461—13 Fed. (2) 1007.

Argument 10, Point 5—Assignment of Error No. 10 TR 31

What Effect Has The Status of The Record?

There was no reply to the Amended or Original Petition filed in this cause.

The Sixth Circuit decided in the case of the Chesapeake and Ohio Railway Company vs. Gibson Company, Federal 25,)2nd) 215 in a Removal case that where a petition for removal is not denied it stands admitted.

Masuk vs. Equitable Life Ins. Company, 21 Federal supp., 840 is a case in point.

> "In the absence of plaintiff's denial of the facts alleged by defendant in his petition for removal the facts are admitted."

Bradshaw vs. Bowden, 226 Federal, 327;

Simon vs. Stangel, 54 Federal (2nd) 73;
Kentucky vs. Caleb Powers, 201 U. S., 1.

The above are Removal cases but the ruling seems to be the same where there is a reference to a Three-Judge Court.

In Central Georgia Railroad vs. Wright, 207 U. S., 127. it is decided, that the assessment and levy of a tax is judicial in its nature, and the taxpayer must have an opportunity to be heard after the assessment is made in order that he may contest either invalidity of the assessment or raise any question of fact which he may raise in his own defense against the assessment.

Due process of law adjudicates by notice and a hearing, and if the levy or assessment is made by an officer unauthorized he is denied due process under the 14th Amendment.

Turpin vs. Levin, 187 U. S., 51;
Green vs. Page, 9 Federal Supp., 847;
Royster Euano Co. vs. Virginia, 253 U. S., 412;
Commonwealth vs. Walsh's Trustees, 133 Ky., 112;
Cooley Vol. 1, 394.

Attachment is a distraint proceeding, (Ky. Stat. Section 2306-2307), penalties cannot be collected by distraint.

Fontenot vs. Arcado, 278 Fed., 875.

We therefore, without abandoning any single Assignment of Error or any Point set up in the Record, respectfully submit to the Honorable Judges of this Court that there is a complete denial of Due Process and the Equal Protection of the Laws in the order of the THREE-JUDGE COURT dismissing Appellants Amended Petition for Injunction, and that the issue as made, the default of Appellees considered the Appellants are entitled to a reversal of the said decree of

the said Court for the Eastern District of Kentucky, and in said reversal directions to the Court and for the determination here of all the issues back of and underlying the decree of dismissal.

Respectfully submitted,

HARVEY H. SMITH, Attorney,
SMITH & SCHUBERTH, Counsel,
WILLIAM A. SCHUBERTH, Counsel.
Counsel for Appellants.

—APPENDIX—

Section 122. Laws Repealed. Act March 7th, 1938.

"Chapter 146, Acts of General Assembly of 1934, approved March 17, 1934, being sections 2554-1 to 2554b-96, inclusive, excepting sections 2554b-67, 2554b-73, of Carroll's Kentucky Statutes, 1936 Edition; Chapter VI of the Acts of the General Assembly of 1917, being section 4214c-1 of Carroll's Kentucky Statutes, 1936 Edition; and Chapter V of the General Assembly at the special session of 1933, being sections 4214d-1 to 4214d-14 of Carroll's Kentucky Statutes, 1936 edition, are hereby repealed and all other laws or parts of laws in conflict with the provisions of this Act are hereby repealed to the extent of such conflict."

The Acts of 1934 and 1936 Appellants claim were never existing laws, and the above repealing Act did not comply with the revision section of the Constitution of Kentucky section 51.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 177

J. W. KOHN, M. S. KOHN and J. W. KOHN, Administrators of the Estate of Carrie Kohn, Deceased.

Appellants,

vs.

CENTRAL DISTRIBUTING COMPANY, INC., and THE COMMONWEALTH OF KENTUCKY, ETC., et al,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Filed July 5th, 1938

REPLY BRIEF FOR APPELLANTS

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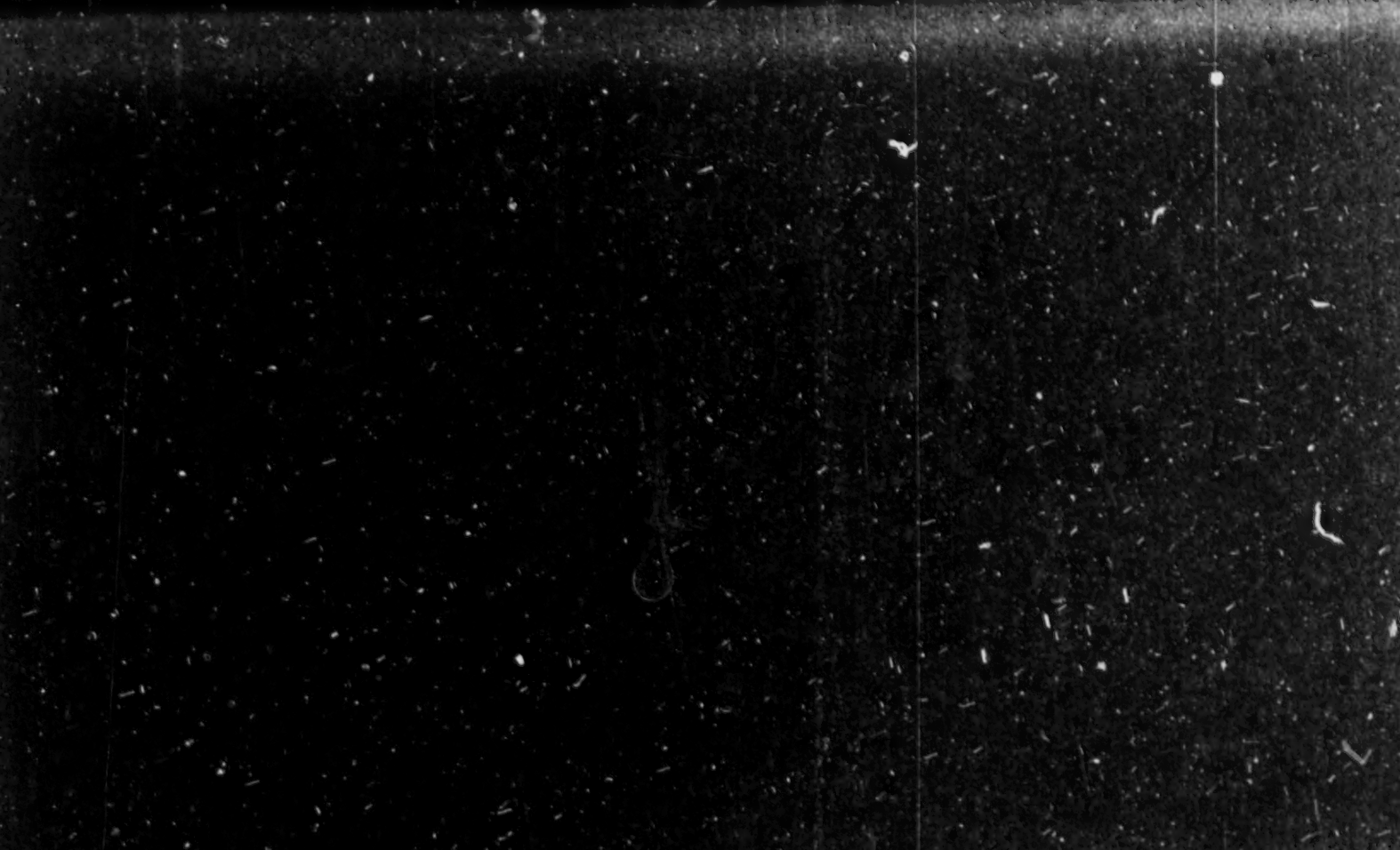

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FEDERAL AND STATE CITATIONS

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Assignment of Error, 2, 5—10, Sec. (238 J. C.)

POINTS 4, 5, 6, 7, 15

Index to Points Discussed:

secures their mortgage note for money loaned a licensee.

At page one, is a gross mis-state ent of fact.

"Proceeding with the prosecution of a suit previously instituted in the Franklin Circuit Court, the fiscal court of the commonwealth, to collect excise taxes alleged to be due the commonwealth."

There was no suit brought against these Appellants, citizens of Ohio. The Code of Kentucky provides that no such suit may be maintained until the mortgagees are made parties. This was done by order of Court (after the filing of this action) and they were served, and did not make their voluntary appearance, but made their objection in due time after service to the jurisdiction of the Franklin Circuit Court. Nor has the Court yet held it has such jurisdiction, and it could not proceed, while this action, as to the Appellants was pending in the United States District Court for the Eastern District of Kentucky. They had the right, as diverse citizens, to bring this action independent of any proceeding in the state court against the state's Co-Defendant.

There never was a Writ of Prohibition filed in this case, and it would be immaterial if there had been. There was never such an action brought by the state's Co-Defendant against it.

There was an injunction to prevent cancellation of its charter and license to do business, and this was denied by the Court, but at no time and in no respect did these Appellants file any such an action, except a mandatory injunction in Campbell County, the proper court of jurisdiction, to require the state to open the business place, which Appellee, the state had closed, and this injunction was **granted and made permanent.**

No such injunction was denied by the Court of Appeals of Kentucky, in any matter where these Appellants were

made parties, or affecting their right of action to sue in this court.

Exhibit A is no part of this record, and will be stricken under the rules of this court for that reason alone, and it may be stricken for another reason, it is not this action, and these Appellants were not parties to it.

Appellants have a constitutional right to proceed in this court by appeal and in the court below, and the legislature of Kentucky nor its courts have any authority in the state of Kentucky to such restrictive right by law.

There is no law anywhere to require a defense to be filed by Appellants in any suit brought by the state in a state Court. They may serve the Appellants, as they did, but after the bringing of this action in the Court below.

Although the state was proceeding in the state court to serve these Appellants, after the filing of this suit, and although Appellants undenied but sworn to, petition in the Court below, faced that Court, admitting the facts shown in the record at page 3 (TR) by Appellant's motion for Confession of Judgment, under the then existing rules.

28 U. S. C., sec. 723.

Rule 5 provides for default pro-confesso, and this means, on the record presented, that all facts were admitted and confession made, since Appellants filed their motion — see motion for judgment page 27 (TR).

Rule 12 provides that this rule, pro-confesso, may be taken by motion.

Rule 17 provides, that after thirty days, the judgment shall become final.

The original petition was filed on the 25th day of February and the Amended petition, April 11th, 1938. Thus elapsed, the 21 days after service of summons on the

original petition. This would be 15th of March for answer. None was filed.

On the 14th of April, Appellants were entitled to Judgment absolute on all the issues presented. Rule 17, made it impossible for the Court to act unless "the court shall at the same term set aside the same".

RULE 16 says:

"It shall be the duty of defendant, unless the time shall be enlarged to file his answer. In default thereof, the plaintiff may, at his election, take an order as of course that the bill be taken pro-confesso; and thereupon the cause shall be proceded in ex-parte."

It is Appellant's contention that, the motion for judgment must be treated as confessed, and the three judge court could not entertain on April 16th a motion to dismiss an Original or Amended petition confessed by law and the rules of the Court where filed.

Rule 19 permitted Appellants to file their amended petition which was a continuation of the original filed February 25, and to which the motion for judgment applied.

Appellants contend that this court must order the cause returned to the District or three judge court with direction to enter judgment in all particulars as alleged in the Appellants Original and Amended petition Ex Parte, and that Appellees can not **now file any pleading.**

Rule 30 provides an answer must be made, and that all averments not denied, not relating to value or damage, shall be deemed confessed if answer not filed.

Under Rule 32, after filing Amended Bill, if filed after answer by defendant, ten days shall be allowed for defendant to plead, but if no answer is or has been filed, the amended Bill is treated as an undenied original bill.

At page 5 it is said, (Appellees Brief).

"Since the three judge court concurred with counsel for Appellee that this case presented but one question".

A look at the order and judgment will prove our contention, that the Act of 1934, void and repealed, presented no remedy, and it was specifically written in the order at Appellant's demand, that, "temporary and permanent injunction be denied, and the motion over-ruled. It being the opinion of the court that petitioners have an adequate remedy in section 12 of the legislative Act of 1934". This to narrow the issue.

This Act never existed and was repealed March 7th 1938, prior to the hearing, and under the decisions of both Kentucky and the United States had no relief virtues after that date for any purpose.

Summarize Appellee's Argument

At page six of Appellee's brief, is injected a statement, which is no part of this record nor based on anything in this record, and is false. Counsel never at any time entered appearance in a cause now pending in the Franklin Circuit Court. These Appellants were served, and appeared and challenged the jurisdiction of the court, but never entered appearance.

Statute referred to at pages 6 and 7 in respect to appeals has no application here, in view of the judgment of the three judge court just quoted.

The balance of page 7 sets out a statute relating to forthcoming redelivery of property, which the Appellants may have availed themselves of. Regardless of this statute, which has no place here, the three judge court specifically grounded their decision on a specific ground of adequate remedy under the Act of 1934. That is the judgment appealed from. Is it good or not?

The State Court cannot prescribe remedies to be pursued to a foreign citizen in a Federal Court, especially when such citizen proceeds, first, in the Federal Court.

C. and G. Company vs. Harris, 235 U. S., page 292.
Hunter vs. Conrad, 85 Federal, 803.

The three judge court must realize the defendant w in default, and it could not consider any question except admitted, an exparte proceeding. The case must go ba on the merits, even though the section 12 of the 1934 A had virtue claimed.

The pendency of this action in the Federal Court by t Kohns was a bar to any proceeding against them in t Franklin Circuit Court—too well settled to require auth ities.

Examine the 1934 Act Argued at Page 10, etc.

The authorities cited here might be applicable and pe tinent in a proper record, they will not be argued he

The Act of 1934 is at issue on the **order of dismissal.**

That Act provided that "the aggrieved **taxpayer** mig bring the action in two years".

It has no application to Appellants, because they a not taxpayers. They are mortgagees entitled to asse seized of their mortgagor, and as diverse citizens, t amount in excess of three thousand dollars, with Appelle **in default, they are entitled** to judgment. That is so mu clear law, that we will ignore the argument of Appellee page 11 of its brief.

Such a provision, if valid would have no application to suit for return of Import Taxes. How could the legislatu prescribe how illegal import taxes should be collected a citizen of Ohio?

He does not come into a state court of Kentucky. comes into a national court to invoke a national constit tional right, and the fiat of a Kentucky legislative Act h not feather weight as an argument.

Fudging is a mild term to be applied to Counsel's brief, from the first to the last word, but at page 15 the limit is reached we think. Here is a supposed decision in an action where Appellants are not parties. A decision, not in this case but in another, where the court adds a decision to the many inglorious decisions of this once esteemed judge.

Read it, then get the citation, which is omitted by counsel, and this court will see that not only has the case no application here, because it is no part of the record, and should be stricken, but it does not decide any such thing as the court says, as a reading will show.

It decides only one question. That a litigant licensee under the Act of 1934 cannot challenge the constitutionality of that Act. Lueke vs. Mescall, 272 Kentucky, 771.

It does not decide that it is constitutional.

Let this court mind, this opinion was rendered March 28th, 1938, "the present Alcohol Control Act In Kentucky" was the Act of March 7th, 1938, not at issue in the case at all, but the Act of 1934, then repealed by the Act of March 7th, 1938, nearly a month before the decision of the court. The court may have had a case of "incongruous memoritis", which sometimes afflicts judges as well as litigants. The present Act on March 28, 1938, was not the Act of 1934.

The case does show that the injunction sought was to prevent cancellation of the Charter of the co-appellee, the Central Distributing Company. It had no relation to any fact litigated here. We are not discussing the right of Central Distributing Company to retain their license. That was the issue there.

Appellee's exhibit at page 16 must be stricken, because this order of dismissal stands alone on the right of suit under section 12 (really 2) of the Act of 1934, and has no relation to the law of the exhibit. That Exhibit is the general law on appeal, and the Act of 1934, section 2 is a

special Act prohibited by section 59 of the Constitution of Kentucky, against special legislative Acts and section 51.

For reasons stated, Exhibit C is not the provision referred to in the order of dismissal, distinctly affirmed by the three judge court opinion, after challenge of Appellant's counsel.

The Act if valid or existing or a part of the record, would not have any territorial force over the collection of invalid import tax in the hands of the state. Besides it is amendment to the Act of 1934, both of which violates the revision clause of the Constitution of Kentucky, section 51, page 32, Appellants original brief.

Such an import tax violates the Federal constitution and the Constitution of Kentucky, section 171, which prohibits the levy of any tax outside the jurisdiction of Kentucky. The levy of import tax is a tax to be paid by wholesalers of other states, charged to their clients in Kentucky.

Thus a wholesaler who pays a license tax in Kentucky to engage in wholesale of interstate commerce whiskey and domestic intra state whiskey pays another license tax to import foreign made liquors, which under the Kentucky constitution is double taxation. See page 43, original brief of Appellants.

The United States Supreme Court has held in McCullough vs. Maryland, 12 Wheaten, U. S. page 419.:

> "All must perceive that the tax on the sale of an article imported into the state is a tax on the article itself".

It could not be a license federal tax, because it is a tax on the whiskey. It could not be a Kentucky license tax for two reasons, it is outside the limits of the state when levied, and it would be a double license tax. The Distiller pays 5 cents as the manufacturers tax-an advalorem tax The same Act levies a property advalorem tax on the whole

saler for importing, which is a tax on the article, and if he sells it in Kentucky he must pay another tax of $1.04 per gallon in order to sell it in Kentucky.

Now he has paid a license tax of $1,000 to do business.

He is paying a license tax and two advalorem taxes.

The wholesaler's license under the Act of 1934 gave him the right to buy, sell and transport liquors, domestic and imported liquors.

The law is discriminatory, because it forces the wholesaler to pay a 5 cent tax on imported whiskey, and no 5 cent tax on the domestic article. This is an unlawful discrimination against imported whiskey and an exemption under the Kentucky Constitution, which is prohibited by the Bill of Rights. No tax shall be levied outside of the territorial limits of the state and no exemption shall be granted in the levy of the tax.

Taxes are levied on property and licenses are levied on privileges. The former is levied for revenue purposes and the latter under the police power of the state, granted to it by the 21st Amendment.

Rule 9

The Appellees must designate the points relied on in their defense and serve them. This they have not done. They must confine their argument and points to the record stipulated in this cause, and therefore under rule 9 of the Supreme Court of the United States nothing else may be considered.

> "The court will consider nothing but the points of law so stated and the parts of the record so designated."

The entire brief of Appellees should be stricken.

We respectfully submit that this record has presented a case, where only ex parte consideration is to be given by the court.

Did the three judge court have any right or authority of law to enter the order of dismissal? The right to injunctive relief was admitted on the record; the right on the merits to foreclose Appellant's mortgage was admitted. The right to judgment for the import taxes had and received was admitted, and the issue of jurisdiction. The unlawful seizure of the property of these Appellants was admitted; the validity of their mortgage was admitted and undenied. Therefore, did the Amended petition state a cause of action to support the judgment on these issues.

SUPPLEMENTAL BRIEF

It is contended that Jurisdiction here may be extended only if the Appellants are denied an interlocutory injunction.

Section 238 Judicial Code U. S., applies to a permanent injunction or dismissal of an action.

Jurisdiction extends to all questions raised by the Bill and not to a single one, where the petition asks for different relief.

The Appellants as citizens of Ohio, suing both Appellees, citizens of Kentucky, jurisdiction lies to enforce their mortgage, since they have the constitutional right, and have elected to foreclose it in the United States Court.

Howard vs. Gipsy Oil Co., 247 U. S., 503;
Champ vs. Boyd, 229 U. S., 530-551-552;
McGowan vs. Parish, 237 U. S., 285.

A suit to determine a tax levied against commerce between the states, is a question of Federal jurisdiction, and is determined without suit in a state court.

St. Louis Railway vs. State of Arkansas, 235 U. S., 350.

When the Federal Court first obtains jurisdiction it retains it, and may by injunction prevent litigants from proceeding in another court.

Here the suit was pending in the Federal Court long before the Appellants **were served in the state court.** To prevent a multiplicity of suits, it will determine the jurisdiction for all purposes, and if it has jurisdiction for one, it will consider all questions raised by the pleadings.

Undenied petitions, where value and damages are not to be determined, a common law issue, a motion for judgment under the rules must be sustained, and the judgment becomes final unless **the practice prescribed is followed.**

If the Court denies injunction, and there are other issues under the pleadings, these issues must be determined, and dismissal is error. Proceeding is then under section 238 Judicial Code.

L. and N. vs. Garrett, 231-303 and 304 (U. S.);

Siler vs. L. and N. Railroad, 213 U. S., 175;

C. and G. vs. Harrison, 235 U. S.;

Oklahoma vs. Wells Fargo, 223 U. S., 295;

Schaffer vs. Carter, 252 U. S., page 37, Judicial Code 238 (US).

Indirect Import Tax, must be treated as a direct tax on Commerce.

Galveston vs. Harrisburg, 210 U. S., 217.

Such a tax as here laid violates "fair cash value levy of taxes", and is discrimnatory. The Wholesaler pays the revenue tax on imports and the domestic liquors are not taxed. This is an unlawful exemption of the domestic wholesaler. If it be contended that the Distiller pays the domestic tax then it lacks uniformity, whether it is an excise or a property tax and is arbitrary classification.

Cumberland and Penn Railroad Co. vs. Maryland, 40 Maryland, 22.

Article 1, sec. 1, U. S. Constitution.

Nathan vs. State of Louisana, 8th Howard, 77.

Woodruff vs. Parham, 8 Wall, 140.

There is no exercise of police power here but a revenue power. If the tax is an excise tax it is void, as discriminating against wholesalers engaged in interstate commerce. It is not a license tax protected by the 21st Amendment.

County of Clara vs. Southern Pacific, 18 Fed., 385.

Such a tax is discrimnatory and lays a burden on interstate Commerce.

Crew-Levick Co. vs. Penn., 245 U. S., 292.
Minnesota Rate Cases, 230 U. S., 352.

If it grant a license to engage in interstate commerce by the levy of a tax it violates the Constitution of the United States.

This was decided in McCullough vs. Maryland, in 12 Wheaton, and in Ward vs. McCullough, 12 Wall, 418 and 430 (US).

It is an indiscriminate tax, levied against imported liquor, whether sold in the state of Kentucky or not.

The Rule of Construction of Tax Statutes.

In Kentucky the rule of construction is strictly against tax statutes and in favor of the tax payer.

Martin vs. F. H. Bee, 271 Kentucky, 829.

A claim assigned, valid in itself, concerning commerce may be collected in the United States Court. It is a tax imposed under Federal authority by a state that does not exist as a taxing power.

Munson vs. North American Ins. C., 85 Federal, 802.

The Lueke vs. Mescall case, 272 Kentucky, 771 injected here, outside of the record, does not decide anything concerning the constitutionality of the 1934 Act. It is based on the case of Stein vs. Kentucky Tax Commission, 266 Kentucky, page 469, where it is said, we distinctly avoid deciding the constitutionality of the Act (1934). We decide that a licensee, who has had the benefit of the Act cannot assail the Constitutionality of the Act.

Section 19 of the Constitution of Kentucky prohibits the

hearing of offenses, penal in character committed under, and violative of, the Act of 1934, and prohibits the enforcement of penalities under it, which is sought to be enforced against the res, on which Appellants had a valid mortgage, proceeding under the Act of 1938, of March 7th, because it violates the prohibition of **ex post facto** legislation. The penalties died, and hence there could be no such suit.

Speckert vs. City of Louisville, 78 Kentucky, 88.

As the diverse Appellants had a right to proceed to collect their mortgage note in the Federal Court and protect their lien, manifestly there was no adequate remedy by appeal, beyond the territory of Kentucky, and if such had been the case, the remedy could not prevent Appellants from proceeding in the Federal Courts under the diverse citizenship Act. If the United States Court took jurisdiction for one purpose, then it had the right to decide all questions. In Frieberg vs. Dawson, 255 U. S. Supra page 288, and in the same case, 274 Federal page 255, it assumed that right, and the three judge court held and decided every issue raised by the pleadings.

Inasmuch as this is also a case to collect taxes levied under Article 1 section 8 of the Constitution of the United States, and the diversity of citizenship exists, there can be no question of jurisdiction in the Federal court, and no question that a mortgage lien must be protected by injunction since the state of Kentucky absolves itself from liability in damages in an action brought by its Revenue agent, who gave no bond for the attachment run against these assets, the property of the mortgagee, who concededly owed the State of Kentucky nothing.

The statute quoted, as applying the adequate remedy doctrine, has no extra territorial effect.

Respectfully submitted,

HARVEY H. SMITH, Attorney,
WILLIAM A. SCHUBERTH, Counsel.
SMITH & SCHUBERTH, Counsel,
Counsel for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 177.

J. W. KOHN, M. S. KOHN, and J. W. KOHN, Administrator of the Estate of CARRIE KOHN, Deceased, - - - - - Appellants,

versus

CENTRAL DISTRIBUTING COMPANY, INC., A Corporation, and COMMONWEALTH OF KENTUCKY, by and on Relation of JAMES W. MARTIN, Commissioner of Revenue, - Appellees.

BRIEF FOR APPELLEE COMMONWEALTH OF KENTUCKY.

HUBERT MEREDITH,
Attorney General, Commonwealth of Kentucky,

WILLIAM HAYS,
Assistant Attorney General,

CLIFFORD E. SMITH,
CLYDE E. REED,
SAMUEL M. ROSENSTEIN,
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Attorneys for Appellee, Commonwealth of Kentucky.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX TO POINTS AND AUTHORITIES.

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 177.

J. W. KOHN, M. S. KOHN, AND J. W. KOHN, ADMINISTRATOR OF THE ESTATE OF CARRIE KOHN, DECEASED, - *Appellants,*

v.

CENTRAL DISTRIBUTING COMPANY, INC., A CORPORATION, AND COMMONWEALTH OF KENTUCKY, BY AND ON RELATION OF JAMES W. MARTIN, COMMISSIONER OF REVENUE, - - - - - - - *Appellees.*

BRIEF FOR APPELLEE COMMONWEALTH OF KENTUCKY.

This is an appeal from a decree of a District Court of three Judges for the Eastern District of Kentucky, whereby the District Court refused to enjoin the Commonwealth of Kentucky, acting through its duly appointed Commissioner of Revenue, from proceeding with the prosecution of a suit previously instituted in the Franklin Circuit Court, the fiscal court of the Commonwealth, to collect excise taxes alleged to be due the Commonwealth.

The District Court declined to issue the injunctio because it was apparent that the petitioners had a co plete and adequate remedy at law without resorting the extraordinary remedy of injunction.

The facts out of which this litigation grew may simply stated and a brief statement of the materi facts will assist the court in the determination of t only issue presented.

STATEMENT OF FACT.

Central Distributing Company, Incorporated, Kentucky corporation, was a wholesale liquor licens of the Commonwealth of Kentucky located in Newpo Campbell County, Kentucky. An audit of the affai of that company for tax purposes was made by t Department of Revenue of Kentucky and a tax li bility was discovered in the amount of Three Thousan One Hundred Ninety-one Dollars and eighty-ni cents ($3,191.89), plus interest and penalties. This t liability grew out of the failure of the Central D tributing Company to purchase from the Commo wealth and affix to whiskey sold by them in Kentuc the Kentucky Consumer's Tax stamps, as required Section 4281c-1 to 4281c-25, both inclusive, Carrol Kentucky Statutes, Baldwin's 1936 Revision. Prompt following the determination that there was a tax li bility the Commonwealth acting by and through duly authorized Commissioner of Revenue institut a civil suit in the Franklin Circuit Court, a court competent jurisdiction, against the Central Distrib

ting Company, in which that Court was asked to issue an order of attachment against any and all property owned by Central Distributing Company to the extent of the plaintiff's claim and costs, and the prayer of that petition further asked that upon final hearing the attachment be sustained, and that judgment for the amount claimed be awarded the Commonwealth.

Upon the filing of that petition the order of attachment was issued as provided by statute, directed to the Sheriff of Campbell County, Kentucky. That officer executed the order of attachment by levying upon a quantity of whiskey of the approximate value of Three Thousand ($3,000) Dollars, which he found on the premises of the Central Distributing Company.

Then followed a barrage of restraining orders, injunctions and writs of prohibition. In the absence of the Judge of the Franklin Circuit Court, Central Distributing Company applied for and obtained a temporary restraining order from the Clerk of that Court. Upon a hearing of the case before the Judge of the Franklin Circuit Court this temporary restraining order was dissolved and an appeal taken to the Court of Appeals of Kentucky. The Circuit Court was affirmed and the application for injunction denied by a Judge of the Court of Appeals on March 28, 1938. A copy of the opinion of that Court is attached as an appendage hereto marked Appellees' Exhibit "A" for identification.

Central Distributing Company also sought, but without success, to enjoin the officers of Campbell County from carrying out the orders of the Franklin

Circuit Court and failing in this these appellants claiming to be mortgagees of Central Distributing Company filed in the United States District Court for the Eastern District of Kentucky their petition also seeking to enjoin the Commonwealth from proceeding toward the collection of this tax. This petition (Pages 3-15, Record) contained a great many allegations attacking among other things the constitutionality of the Consumer's Tax Act; the Import Tax Act; the jurisdiction of the Franklin Circuit Court; it was alleged that these appellants were mortgagees of the Central Distributing Company and that as such, they had a claim prior and superior to that of the Commonwealth on the property of the Central Distributing Company; and many other allegations which, as we conceive it, were completely irrelevant and of no materiality in the injunctive proceeding.

It was the position of the Commonwealth of Kentucky in the District Court and the position of the Commonwealth here that if any of the allegations of appellee's petition for injunctive relief are well taken such matters might properly be presented by way of defense in the action in the Franklin Circuit Court, and that, therefore, appellants had a full, complete and adequate remedy at law.

The three Judge Federal Court adopted the contention of the Commonwealth that the motion for a temporary and permanent injunction should be denied because the contentions asserted by appellants herein, if meritorious, were available as matters of defense in the State Courts and that the appellants, therefore,

had available a complete and adequate remedy at law and were not entitled to the extraordinary remedy of injunction.

The position taken by appellants before the District Court and upon this appeal is not supported by a decision of this Court in so far as we have been able to find, and it is submitted that the conclusions reached by the District Court is supported by an unbroken line of decisions of this and inferior Federal Courts. Since the three Judge District Court concurred with counsel for appellee that this case presented but one question, we shall refrain from an extended discussion of the many questions presented in appellants' typewritten brief and will present for the attention of this Court a line of decisions which are decisive in the determination of the one issue presented. (Appellants' printed brief not yet received.)

ARGUMENT.

The question presented is whether the injunctive powers of the Federal Courts may be invoked by an alleged mortgagee of personal property against the State of Kentucky and its administrative officers, who, in the manner provided by Kentucky Law, have instituted a tax suit in the appropriate fiscal court of the State against an alleged debtor and licensee and have had an order of attachment issued and served upon property upon which a lien is asserted by the mortgagees.

The Kentucky Legislature in enacting the Alcoholic Beverage Tax Acts of 1934 and of 1936 provided in Section 4281c-20, Carroll's Kentucky Statutes, for the institution of civil tax suits and the procuring of orders of attachment to protect the Commonwealth on claims asserted. This the Commonwealth has done in the case filed against the Central Distributing Company. It was not known by the Commonwealth at the time the attachment was issued and levied that the appellants were claiming an interest in the property attached under a recorded mortgage. Promptly upon that fact being brought to the attention of the State, an amended petition was filed in the State Court asking that the mortgagees be made parties to that proceeding and that they assert whatever claim they might have or forever be barred. Their appearance was entered by counsel now representing them in this Court and the matter can without prejudice be disposed of by the State Court.

Should the mortgagees, appellants here, or the Central Distributing Company feel themselves aggrieved by the conclusions reached by the Franklin Circuit Court, they have the most complete and adequate remedy that any litigant may desire, and that is of appeal to the Court of last resort, which in Kentucky is the Court of Appeals.

It is expressly provided by the Kentucky Statutes, Section 950-1, Carroll's Kentucky Statutes, Baldwin's 1936 Revision, that *an appeal may be taken to the Court of Appeals as a matter of right* from the judgment of the Circuit Court in all cases in which the title to land

or the right to an easement therein is directly involved, *and it is further provided that an appeal may be prosecuted as a matter of right* from any judgment for the recovery of money or personal property or the enforcement of a lien *if the value in controversy exceeds $500.00 exclusive of interest and costs.* A copy of this section of the Kentucky Statutes is appended hereto marked "Appellees' Exhibit B" for identification.

Thus it is clear that the appellant mortgagees or the appellee, Central Distributing Company, could have appealed from any final judgment of the Franklin Circuit Court in the event of an adverse determination of the defenses or claims asserted therein.

It may be argued that the mortgagees or the debtor was prejudiced by the execution of the order of attachment and of their being deprived of the possession of the property thus seized. They had and have an adequate remedy to repossess themselves of the property by executing the bond provided by Section 221, Carroll's Civil Code of Practice of Kentucky, that the property will be forthcoming in the event the order of attachment is sustained. Should the lower court have entered an order sustaining the attachment, the owners of the property or the mortgagees could still have retained possession by executing a supersedeas bond pending the appeal before the Court of Appeals of Kentucky. If that court decided the issue adversely to the mortgagees or debtor, they possessed and now possess the adequate remedy of a direct appeal from the Kentucky Court of Appeals to this Honorable Court for a review of constitutional questions.

Thus we see that both the appellants and co-appellees at every stage of the proceeding in the State Court possessed the means whereby they were not called upon and could not be called upon to sacrifice any right or defense that they might have, or to surrender the property involved in this controversy.

We direct the Court's attention to these facts as sustaining the conclusion of the District Court that appellants possessed a complete and adequate remedy at law.

Aside from the general law of Kentucky, which in itself affords adequate relief to these appellants, the District Court found, and properly so, that Section 4214a-23, Carroll's Kentucky Statutes, Baldwin's 1936 Revision, afforded specific relief to these appellants, and that by complying with that Section there would have been no need for an attachment. For the consideration of the Court we append hereto Appellees' Exhibit "C" which is Section 4214a-23, Carroll's Kentucky Statutes, Baldwin's 1936 Revision. A consideration thereof will reveal at once that a method was provided whereby the Central Distributing Company or these appellants could have paid the tax claimed by the Commonwealth either with or without protest and that at any time within two years from the date of such payment they could have sued the Commonwealth through its agent, the Auditor of Public Accounts, in an action at law in a proper court to recover back the taxes paid. In this manner any and every question touching the constitutionality of the tax; the jurisdiction of the Court; priority of the rights

of the parties, or any other question which might properly be raised could have been adjudicated in the usual manner.

We are aware of no decision by this Court which would even remotely tend to support the position of these appellants. It has been held with the greatest uniformity that the illegality or unconstitutionality of a tax is not of itself a ground for injunctive relief in the Courts of the United States. If the aggrieved party has a complete, practicable and efficient remedy at law, injunctive relief will not be granted.

We submit that it would be difficult to find a case in which a more complete and adequate remedy at law exists than in the case at bar. If appellants have a prior and superior lien to that of the Commonwealth to the property attached, then it is provided by Section 29, Carroll's Civil Code of Practice of Kentucky, appended hereto as "Appellees' Exhibit D" that appellants may assert their alleged lien in the action now pending in the Franklin Circuit Court. If the Franklin Circuit Court is without jurisdiction or the tax is unconstitutional, such matters would constitute a defense to the action and could properly be litigated in a proper court. Certainly the existence of a defense to an action does not vest an aggrieved party with the right to apply to a Federal Court for injunctive relief.

So numerous are the cases sustaining the position of the Commonwealth here that we shall limit our citation of authorities to only a few of the cases which could be cited.

It is provided in 28 U. S. C. A., Section 379:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Construing this statutory provision, in Boise Artesian H. & C. Water Company v. Boise City, 213 U. S. 276, 29 Supreme Court Reporter, 426, the Court aptly expressed the rule enunciated by prior cases and followed without exception since that time:

> "An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired. It has been held uniformly that the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable, and efficient as the remedy in equity. *And the rule applies as well where the right asserted is by way of defense.* Phoenix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 623, 20 L. Ed. 501, 503.
>
> "In order to give equity jurisdiction, there must be shown, in addition to the illegality or unconstitutionality of the tax or imposition, other circumstances bringing the case under some recognized head of equity jurisdiction, before the rem-

edy by injunction can be awarded. The leading case on the subject is Dows v. Chicago, 11 Wall. 108, 20 L. Ed. 65. In that case the plaintiff sought to enjoin the collection of a tax levied upon shares of the capital stock of a national bank on the ground that the levy was unconstitutional under the state law, and that the property was not within the jurisdiction of the state. This court declined to pass upon the validity of the tax, saying, through Mr. Justice Field (p. 109):

" 'The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. * * *

" 'No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked.'

"This case has been frequently followed and its governing principle never doubted."

(Italics in the above quotation ours.)

Citing with approval the Boise City case, *supra*, this Court, adhering to the rule enunciated therein and emphasizing its uniformity, said in an opinion delivered by Mr. Justice Stone in Matthews v. Rodgers, 284 U. S. 521, 52 Sup. Ct. 217:

> "*Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved, Jud. Code, p. 237 (28 U. S. C. A., p. 344), or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present.*" (Italics ours.)

The rule enunciated in the foregoing cases has prevailed since the decision in Dows v. Chicago, 11 Wall. 108. It was reaffirmed in Shelton, Sheriff, *et al.*, v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, and has been uniformly followed.

While it has been held that the remedy at law must be plain, adequate, complete and as efficient to the ends of justice as the remedy in equity to preclude the maintenance of an equitable suit (Boise Artesian H. &

C. Water Company v. Boise City, 213 U. S. 276, 29 Supreme Court Reporter, 426; Matthews v. Rodgers, 284 U. S. 521, 52 Sup. Ct. 217), we do not believe appellants here can cite in support of their contention any decision of this Court to the effect that when such remedies existed as are present in the case at bar that injunctive relief by the Federal Courts was held to be proper.

Likewise, injunctive relief has been granted where the remedy at law was inadequate or uncertain or if available would entail a multiplicity of suits (Dawson v. Kentucky Distilleries and Warehouse Company, 255 U. S. 288. 41 Sup. Ct. 272; Chicago and N. W. Railway Company v. Bouman, 69 Fed. (2d) 171), yet obviously such decisions have no application in a case such as the one at bar. The remedy available to these appellants is completely adequate. It would entail no multiplicity of suits. It is readily available under prevailing statutes of Kentucky.

CONCLUSION.

We do not feel that we should further lengthen this brief. We have planted our case squarely upon the proposition that Federal Courts are reluctant to interfere with or obstruct the legitimate operations of the government of a state. We are firmly convinced that the cases cited fully sustain our position. We do not deem it necessary nor proper to argue the multitude of contentions advanced in brief for appellants for the reason that they are wholly foreign to this litigation.

There is not a single contention advanced by appellants which could not properly be made as a matter of defense in the State Courts and we, therefore submit without further elaboration that the District Court did not err in holding that appellants, having a plain, adequate and complete remedy at law, were not entitled to an injunction, temporary or permanent, by the Federal Courts.

We have been furnished with a typewritten copy of what purports to be brief for appellants but at the time of the preparation of this brief we have not received printed copy of brief for appellants and are, therefore, deprived of the opportunity of knowing specifically what appellants' brief will contain.

Respectfully submitted,

HUBERT MEREDITH,
Attorney General, Commonwealth of Kentucky.

WILLIAM HAYS,
Assistant Attorney General.

CLIFFORD E. SMITH,
CLYDE E. REED,
SAMUEL M. ROSENSTEIN,
J. J. LEARY,
General Counsel, Department of Revenue, Commonwealth of Kentucky.

Attorneys for Appellee, Commonwealth of Kentucky.

APPELLEES' EXHIBIT A.

FRANKLIN CIRCUIT COURT.

CENTRAL DISTRIBUTING COMPANY, - - - *Plaintiff,*

v.

THEODORE HAGEMAN,
DIRECTOR OF ALCOHOLIC CONTROL
DEPARTMENT, ETC., ET AL., - - - *Defendants.*

ORDER OF JUDGE THOMAS OF THE COURT OF APPEAL OVERRULING MOTION FOR TEMPORARY INJUNCTION THAT THE FRANKLIN CIRCUIT COURT DENIED.

The motion of plaintiff to grant the injunction prayed for in its petition against Theodore Hageman and Dr. James W. Martin, officers having the administration of the present Alcohol Control Act in Kentucky, is overruled. The validity of the present Alcohol Control Act was upheld by the Court of Appeals in an opinion delivered on March 25, 1938, in the case of Lueke, et al. v. Mescall, et al., and which has not yet been published. The other objections raised to the hearing to revoke plaintiff's license, and which is sought to be enjoined herein are so unmeritorious for that purpose as to require no discussion.

The motion is made pursuant to the provisions of section 297 of the Civil Code of Practice, but for the reasons stated, it is overruled.

Witness my hand as Judge of the Court of Appeals of Kentucky this March 28, 1938.

(signed) GUS THOMAS,
Judge of the Court of Appeals.

APPELLEES' EXHIBIT B.

Carroll's Kentucky Statutes, Baldwin's 1936 Revision, Section 950-1:

> "An appeal may be taken to the court of appeals as a matter of right from the judgment of the circuit court in all cases in which the title to land or the right to an easement therein, or the right to enforce a statutory lien thereon is directly involved, but no appeal shall be taken to the court of appeals as a matter of right from a judgment for the recovery of money or personal property, or any interest therein, or to enforce any lien thereon, if the value in controversy be less than five hundred dollars, exclusive of interest and costs, nor to reverse a judgment granting a divorce, or punishing contempt; nor from any order or judgment of the county court, except in actions for the division of land and allotment of dower; nor from any order or judgment of the quarterly, police, fiscal or justices' court; nor from a bond having the force of a judgment. In all other civil cases the court of appeals shall have appellate jurisdiction over the final orders and judgments of the circuit courts: provided, however, that the court of appeals may grant an appeal when it is satisfied from an examination of the record that the ends of justice require that the judgment appealed from should be reversed; or when the construction or validity of a statute or the construction of a section of the constitution is necessarily and directly put in issue, and a correct decision of the case cannot be had without passing on the validity of the statute or construing the section of the constitution or statute involved, if the value of the amount or thing in controversy, exclusive of interest and costs, is as much as two hundred dollars."

APPELLEES' EXHIBIT C.

Carroll's Kentucky Statutes, Baldwin's 1936 Revision, Section 4214a-23:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax levied by this Act. The aggrieved taxpayer shall pay with or without protest the tax as and when required and may at any time within two years from the date of such payment sue the Commonwealth through its agent, the Auditor of Public Accounts, in an action at law in any court, state or federal, otherwise having jurisdiction of the parties and subject matter, for the recovery of the tax paid with legal interest thereon from the date of payment. If it is finally determined that said tax or any part thereof was wrongfully collected, for any reason, it shall be the duty of the Auditor of Public Accounts to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected together with legal interest thereon. The Treasurer shall pay the same at once out of the general expenditure fund of the State in preference to other warrants or claims against the Commonwealth. A separate suit need not be filed for each individual payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made." (1934, c. 149, Sec. 12. Eff. March 17, 1934.)

"APPELLEES' EXHIBIT 'D'."

Carroll's Civil Code of Practice of Kentucky, Section 29, provides:

> "In an action or proceeding for the recovery of real or personal property, or for the subjection thereof to a demand of the plaintiff under an attachment or other lien, any person claiming a right to, or interest in, the property or its proceeds, may, before payment of the proceeds to the plaintiff, file, in the action, his verified petition, stating his claim and controverting that of the plaintiff; whereupon the court may order him to be made a defendant; and upon that being done, his petition shall be treated as his answer. But if he be a non-resident he must give security for costs."

SUPREME COURT OF THE UNITED STATES.

No. 177.—October Term, 1938.

J. S. Kohn, M. S. Kohn and J. W. Kohn, administrators of the estate of Carrie Kohn, deceased, Appellants,

vs.

Central Distributing Co., Inc., and the Commonwealth of Kentucky, etc., et al.

Appeal from the District Court of the United States for the Eastern District of Kentucky.

[April 17, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Commonwealth of Kentucky, acting through its Commissioner of Revenue, brought suit in the Franklin Circuit Court of that State to recover the amount of a tax claimed to be due from the Central Distributing Company, a Kentucky corporation. A writ of attachment was issued and levied upon certain whiskey which appellants claimed was subject to their lien under a chattel mortgage executed by the company. The mortgagor was in default and appellants had taken possession of the property.

Contending that the statutes under which the tax was assessed and sought to be enforced (Alcohol Control Act, effective March 17, 1934, Alcohol Beverage Tax Act, effective May 1, 1936, and Alcohol Beverage Control Law, effective March 7, 1938) were invalid under the state constitution and also under the commerce clause, the contract clause, and the due process clause of the Fourteenth Amendment, of the Federal Constitution, appellants brought this suit in the federal court against the Commonwealth, on relation of the Commissioner of Revenue, and the Sheriff, to restrain the proceedings to collect the tax and to prevent the defendants from disposing of the property which had been attached.

Defendants moved to dismiss the petition upon the ground that the plaintiffs had an adequate legal remedy and that the court was without jurisdiction to grant the relief sought.

On hearing of the application for a temporary and permanent injunction, the District Court, composed of three judges, dismissed the petition. The court stated that it was its opinion that Section 12 of the Alcohol Control Act of 1934 "furnishes petitioners an adequate remedy . . . to contest the validity of said Act and to recover any taxes collected from them by the State of Kentucky" thereunder. The case comes here on appeal. Jud. Code, Sec. 266, 28 U. S. C. 380.

Appellants contest the ruling of the District Court, asserting that under Section 12 of the Act of 1934—the text of which is set forth in the margin[1]—the remedy is given only to the *taxpayer* and is not available to appellants, the taxpayer's mortgagees. The Commonwealth urges the contrary, but points to no decision of the state court which is decisive of that point.

Apart from that question, the Commonwealth insists that appellants had a plain and adequate remedy by appearing in the attachment suit in the Franklin Circuit Court where all issues as to the validity of the tax and the propriety of the proceedings for enforcement could be litigated and determined, with the ultimate right of review in this court of any federal question raised and decided. The Commonwealth points to the provision of the Civil Code of Practice of Kentucky, Section 29,[2] under which any per-

[1] Section 12 of the Act of 1934 (Carroll's Kentucky Statutes, Baldwin's 1936 Revision, Section 4214a-23) is as follows:

"No suit shall be maintained in any court to restrain or delay the collection of payment of the tax levied by this Act. The aggrieved taxpayer shall pay with or without protest the tax as and when required and may at any time within two years from the date of such payment sue the Commonwealth, through its agent, the Auditor of Public Accounts, in an action at law in any court, state or federal, otherwise having jurisdiction of the parties and subject matter, for the recovery of the tax paid with legal interest thereon from the date of payment. If it is finally determined that said tax or any part thereof was wrongfully collected, for any reason, it shall be the duty of the Auditor of Public Accounts to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected together with legal interest thereon. The Treasurer shall pay the same at once out of the general expenditure fund of the State in preference to other warrants or claims against the Commonwealth. A separate suit need not be filed for each individual payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made".

[2] The text of Section 29 of the Civil Code of Practice is as follows:

"In an action or proceeding for the recovery of real or personal property, or for the subjection thereof to a demand of the plaintiff under an attachment or other lien, any person claiming a right to, or interest in, the property or its proceeds, may, before payment of the proceeds to the plaintiff, file, in the action, his verified petition stating his claim and controverting that of the plaintiff; whereupon the court may order him to be made a defendant; and upon that being done, his petition shall be treated as his answer. But if he be a non-resident he must give security for costs".

son claiming an interest in property which has been attached may file his petition stating his claim and controverting that of the plaintiff in the attachment whereupon he may be made a defendant, his petition being treated as an answer. See, also, Carroll's Kentucky Statutes, Baldwin's 1936 Revision, Section 950-1.

Appellants assert that the Franklin Circuit Court was without jurisdiction of the attachment suit, but that question, appropriately one for the decision of the state court, could manifestly be presented and determined in that action.

Appellants also state that in the present suit they asked the federal court to exercise its equity powers in their aid in the foreclosure of their mortgage, but it is apparent that this relief is merely incidental and that the main object of the suit is to restrain the proceedings in the Franklin Circuit Court which had been brought to enforce the collection of the tax.

This endeavor, aside from the application of the general principle governing the equity jurisdiction, encounters two positive statutory prohibitions: (1) that of Section 265 of the Judicial Code (28 U. S. C. 379) providing that an injunction shall not be granted to stay proceedings in a state court (*Essanay Film Company* v. *Kane*, 258 U. S. 358, 361; *Monamotor Oil Company* v. *Johnson*, 292 U. S. 86, 97; *Hill* v. *Martin*, 296 U. S. 393, 403); and (2) the provision of the Act of August 21, 1937 (50 Stat. 738) amending the first paragraph of Section 24 of the Judicial Code to the effect that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State".

The judgment is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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